(17,597.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 177

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EMMA HUMBLE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1899, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the first day of May, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-fourth day of February, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the western district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of The Texas and Pacific Railway Company, plaintiff in error, *vs.* Emma Humble; which said transcript of record is in the words and figures following, to wit:

1 In the United States Circuit Court, Texarkana Division, of the Western District of Arkansas.

Pleas before the Hon. John H. Rogers, District Judge, on the 26th Day of November, A. D. 1898.

In the Miller Circuit Court.

EMMA HUMBLE, Plaintiff,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant. } Complaint at Law.

The plaintiff for her cause of action against the defendant alleges: The defendant is a railway corporation, and during the time of the commission of the grievances hereinafter complained of did and ever since has operated and is still operating a line of railway extending from and in the city of Texarkana, Miller county, Arkansas, to the city of Shreveport in the parish of Caddo, in the State of Louisiana, and was and still is a common carrier over its said line of passengers for hire and has a station agent in said Miller county upon whom process may be served.

Heretofore, on the 9th day of April, 1898, the plaintiff, a woman in good health, accompanied by and in charge of her three children, to wit: a girl of about fourteen years of age and two boys of the age of twelve and five respectively, went to the depot and waiting-room used as such by the defendant in said city of Texarkana, Miller county, Arkansas, for the purpose of obtaining transportation and

becoming passengers over the line of the defendant's railway from said Texarkana to said Shreveport.

The regular time for the departure of the train that plaintiff expected to be carried upon was about nine (9) o'clock p. m., and the plaintiff arrived at said waiting-room some minutes before that hour, and after seating her children in said waiting-room, she went to ticket office of the defendant in said building and adjacent to and with the opening or window where the defendant sold its tickets to persons intending to become passengers, opening from said ticket office into said waiting-room, and then and there purchased from the defendant's ticket agent a ticket for herself entitling her
2 to be carried as a passenger over the line of the defendant's railway from Texarkana to Shreveport, as aforesaid. Plaintiff further alleges that in said waiting-room were seats provided for patrons of the defendant who might be waiting for its trains to depart. That the bottoms and backs of said seats were made of perforated wood that was or had been fastened or nailed to the frame of said seats or benches, and that said bottoms and backs of each seat were made from a single bent or curved piece of perforated wood or other material, and the fastening of the back and bottom of one of said seats had become broken or loose. That said seat so broken or loose was the one in said waiting-room immediately facing the lunch counter in said waiting-room and most distant of that row of seats from the ticket office. The defendant knew of said defective seat and had had knowledge of said defect for a long space of time, to wit, for (—).

Plaintiff further alleges that there was nothing in the appearance of said seat that indicated, nor did she have any notice that said seat was in any manner defective, or its bottom or back had become detached or loosened from its frame or superstructure, and the plaintiff, after purchasing her ticket, as aforesaid, retired from the ticket window and sat down upon said seat with its bottom or side so detached or loosened, as aforesaid, and immediately upon her so sitting down upon said seat, said bottom or back so broken or loosened as aforesaid, gave way or slipped in such manner that plaintiff fell or dropped down into the hole made by the giving or slipping away of said perforated wood bottom and back, her feet and head remaining above while the posterior portion of her body was far below the top of said opening or hole so caused as aforesaid in said seat. That she was so wedged in and doubled up that she could (—) extricate herself and remained in this condition until pulled out of said hole by a stranger. In the fall, as aforesaid, the plaintiff involuntarily threw her head and body to one side and bruised her arm, shoulder, side and head severely, which resulted immediately in an extremely violent headache. While plaintiff was confined in the undignified position as aforedescribed, there were many persons in and about said waiting-room and among them there was much mirth and laughter at plaintiff's condition and plight, whereby she was greatly mortified.

Plaintiff alleges that while so wedged and confined in as aforesaid, she made efforts to release herself, and either from the fall or

struggle to relieve herself, she ruptured herself, receiving an inguinal hernia.

3 Plaintiff alleges that said last-named injury is permanent, has been and always will be painful, and that she must always wear a truss or some similar appliance and be debarred from performing (*from performing*) many of her household duties, such as lifting, or she must submit to a surgical operation which will be painful and dangerous.

Plaintiff was, at the date of her injuries as aforesaid (*was*), thirty-six years of age, and her expectancy of life was thirty years; that she had been accustomed to do and had done all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one-half.

Plaintiff alleges that by reason of the negligence of the defendant in failing to provide and maintain said seat in a reasonably safe condition, she has been humiliated and damaged as before stated in the sum of twenty-five thousand dollars.

Wherefore plaintiff prays judgment against said defendant for damages in the sum of twenty-five thousand dollars and for other relief.

THATCHER & WELCH AND
SCOTT & JONES,
Attorneys for Plaintiff.

Filed May 23rd, 1898.

J. D. SANDERSON, *Clerk.*

In the Circuit Court of Miller County, Ark.

EMMA HUMBLE
vs.
TEXAS & PACIFIC RAILWAY CO.

Petition for Removal.

The petition of the Texas and Pacific Railway Company, respectfully shows the court:

First. That the Texas and Pacific Railway Company was and is a corporation duly organized and existing under and by virtue of the laws of the United States to wit: "An act to incorporate the Texas and Pacific Railway Company and to aid in the construction of its road, and for other purposes," approved March 3rd, 1871, and acts amendatory thereof and supplemental thereto including an act approved May 2nd, 1872, whereby among other things the name, style and title of said Texas and Pacific Railway Company was changed to the Texas and Pacific Railway Company

4 Second. That the above-entitled cause was commenced in the above-named court on the 23rd day of May, 1898, and citation issued therein was served upon this defendant on the

23rd day of May, 1898, which said citation is returnable on the first Monday in June, 1898, it being the 6th day of June, 1898, and this defendant is not and will not be required by the laws of the State of Arkansas or the rule of this court to answer or plead to the petition of the plaintiff before the 8th day of June, 1898.

Third. That the matter in dispute in the case exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and this suit arises under the laws of the United States *as* hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff to recover twenty-five thousand dollars damages for injuries received by her on April 9th, A. D. 1898, in the passenger depot and waiting-room at Texarkana, Ark., caused by a bench in the waiting-room breaking and causing plaintiff to fall and receive personal injuries, and was humiliated and caused to have headache and have inguinal hernia, as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action; that this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States approved March 3rd, 1871, entitled An act to incorporate the Texas & Pacific railway and to aid in the construction of its road and for other purposes, and acts amendatory thereof and supplemental thereto, approved respectively on May 2nd, 1872, March 3rd, 1873, and June 22nd, 1874.

Fourth. That the above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States for the western district of Arkansas, Texarkana division, is given original jurisdiction by act of Congress approved March 3rd, 1887, to wit: an act entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and the acts of Congress approved August 13th, 1888, entitled "An act to correct the enrollment of an act approved May 3rd, 1887, entitled 'An act to amend sections 1, 2, 3, and 10, of an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March 3rd, 1875.'"

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit
5 court of the United States for the western district of Arkansas, Texarkana division, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to accept said petition and bond, and to (*to*) remove this cause to the circuit court of the United States for the western district of Arkansas, Texarkana division, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY CO.,
By F. H. PRENDERGAST, *Attorney.*

THE STATE OF TEXAS, }
County of Dallas. }

E. W. Tower, being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the assistant auditor of said company; that the said Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

E. W. TOWER.

Sworn to and subscribed before me this 2nd day of June, 1898.

[SEAL.] W. H. COPE,
Notary Public, Dallas County, Tex.

In the Circuit Court of Miller County, Arkansas, — Judicial District.

EMMA HUMBLE }
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. }

Know all men by these presents that the Texas and Pacific Railway Company as principal and Guy Sumpter and Edw. O. Tenison as sureties are held and firmly bound unto Emma Humble in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the said Emma Humble, her heirs and assigns, we jointly (—) severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions that:

Whereas, the said Texas & Pacific Railway Company has filed its petition in the circuit court of Miller county for the removal of a certain cause therein pending, wherein (*in*) Emma Humble is plaintiff and The Texas & Pacific Railway Company is defendant,
6 said cause being numbered upon the docket of said court as No. 55, to the circuit court of the United States for the western district of Arkansas, Texarkana division:

Now, therefore, if the said Texas & Pacific Railway Company shall enter in said circuit court of the United States for the western district of Arkansas, Texarkana division, a copy of the record in said suit on the first days of the next session thereof and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter bail in said suit if the same was originally requisite in said cause, then this obligation shall be void, otherwise of full force and effect.

Witness our hand and seal this 2nd day of June, 1898.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FATEMAN, *Gen. Attorney.*
GUY SUMPTER.
EDW. TENISON.

STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk of the district court in and for Dallas county, do certify that the sureties on the within bond are in my opinion good and ample security for the amount therein specified and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Dallas, this 2nd day of June, 1898.

H. W. JONES,
Cl'k District Court, Dallas County.

Filed the 6th day of June, 1898.

J. D. SANDERSON,
Clerk District Court.

In Miller County Circuit Court.

EMMA HUMBLE }
vs.
TEXAS & PACIFIC RAILWAY COMPANY. }

JUNE 7TH, 1898.

This day comes on to be heard the above cause on defendant's application to remove said cause to the United States circuit court, and the court after inspection grants said application and approves the bond accompanying said application. It is therefore ordered, adjudged and decreed that the above cause be and the same is hereby removed to the United States circuit court for the western district of Ark., Texarkana division, and the clerk of this court will deliver proper transcript upon being paid his fee.

7 *Clerk's Certificate.*

STATE OF ARK., }
County of Miller. }

I, J. D. Sanderson, clerk of the circuit court within and for the county and State aforesaid do hereby certify that the above and foregoing 9 sheets contain a true, perfect and complete transcript of the papers and records in the case of Emma Humble *vs.* The Texas and Pacific Railway Company, numbered 55, as the same appear of record in my office.

Given under my hand and seal of office at Texarkana, Miller county, Arkansas, on this the 13th of June, 1898.

[SEAL.] J. D. SANDERSON,
Clerk Circuit Court, Miller County, Arkansas.

Indorsed: No. 151. Emma Humble *vs.* Texas & Pacific Railway Company. Filed June 27th, 1898. Sam. Gibson, clerk.

November Term, Nov. 14th, 1898.

Be it remembered that at a circuit court of the United States of America, in and for the western district of Arkansas, Texarkana

division, begun and holden on the 14th day of November, A. D. 1898, at the United States court-room in the city of Texarkana, Ark., the Hon. John H. Rogers, district judge, presiding and holding said court, the following proceedings were had, to wit:

EMMA HUMBLE
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } 151.

Comes the defendant by J. E. Cook and F. H. Prendergast and by leave of the court files its motion to make Humble, husband of the plaintiff, a party to this suit.

In the United States District Court, Western District of Arkansas.

EMMA HUMBLE, Plaintiff,
vs.
THE TEXAS & PACIFIC RAILWAY CO., Defendant.

Answer.

The defendant admits that it is a railway corporation, and a common carrier, and has a depot at Texarkana for passengers. It admits that the plaiutiff, Emma Humble, went to the depot for the purpose of taking passage on defendant's cars, and had entered the waiting-room for that purpose, and did (—) passage on defendant's cars at about the time named.

8 Defendant alleges that plaintiff was at the time of the alleged injury, and is now, a married woman.

Defendant denies that plaintiff, Emma Humble, received any injuries to her person by reason of one of the seats in said waiting-room breaking with her. Wherefore she ought not to recover.

JOE E. COOK &
F. H. PENDERGRAST,
Att'ys for Defendant.

Friday, November 25th, 1898, a regular day of the November term of said court presiding and holding said court, the Hon. John H. Rogers, dist. judge, the following proceedings were had, to wit:

FRIDAY, *November 25th*, 1898.

EMMA HUMBLE, Plaintiff,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant. } 151.

Comes the plaintiff by Scott & Jones, Esqs., her attorneys, and comes the defendant by F. H. Pendergrast and J. E. Cook, Esqs., its attorneys, and the parties announcing themselves ready for trial, a jury came, to wit: Jas. G. Hill, J. C. Forenby, H. P. Bolger, J. W. Lambeth, Peter F. Simmons, W. F. Milner, W. M. Forgy, Virgil Thompson, W. H. Robinson, John P. Ross, C. H. Strong and W. M. Hester, being twelve good and lawful men of the district, who were

duly tried, empanelled and sworn to try the issues joined between the plaintiff and the defendant, and a true verdict give, according to the law and the evidence, as well on the part of the plaintiff as of the defendant, and now the hour being late and it appearing that there is not sufficient time in which to complete the trial, it is ordered that the jury in this case be respited over until tomorrow morning at 8 o'clock, under the strict instructions of the court.

SATURDAY, *Nov.* 26, 1898.

Court met pursuant to adjournment, presiding and holding said court the Hon. John H. Rogers, district judge, and the following proceedings were had, to wit:

EMMA HUMBLE, Plaintiff,
vs.
THE TEXAS & PACIFIC RAILWAY CO., Defendant.

Judgment.

Come the parties by their respective attorneys and the jury in this case respited over from yesterday, and the trial of this case is resumed, and after hearing all the evidence, the argument of
9 counsel and the instructions of the court, retire to consider of their verdict, and afterwards to return into open court the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess her damages at $9,000.

"J. G. HILL, *Foreman.*"

It is therefore considered, ordered and adjudged by the court that the plaintiff, Emma Humble, have and recover of and from the defendant, The Texas & Pacific Railway Company, the said sum of nine thousand dollars ($9,000.00), together with all her costs in and about this cause expended, and have execution thereof, to which verdict and judgment of the court the defendant excepted, and it is granted until the 15th day of Jan., 1899, in which to file its bill of exceptions, and it is further ordered that no execution issue in this court before the 15th day of Jan., 1899.

Bill of Exceptions.

In the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

EMMA HUMBLE
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of the above cause, which began on November 25th, 1898, and ended on Nov. 26th, 1898, the following proceedings were had:

Before the trial began, and on Nov. 17th, 1898, the defendant, The

Texas and Pacific Railway Company, made a motion to the court to compel the plaintiff, Emma Humble, to make her husband, J. K. Humble, a party plaintiff, and on the hearing of said motion on Nov. 17th, 1898, it was admitted that plaintiff was a married woman and that J. K. Humble was her husband both now and at the date she was injured, and that her husband then lived and now lives in Shreveport, La., as his home.

The court overruled said motion and the defendant then and there excepted (*the*) to the ruling.

Said motion is as follows:

In the United States District Court, Western District of Arkansas.

EMMA HUMBLE, Plaintiff,
vs.
THE TEXAS AND PACIFIC RAILWAY CO., Defendant.

Motion to Make Party Plaintiff.

Now comes the Texas & Pacific Railway Company, the defendant in the above cause, and shows to the court that both now and at the date the plaintiff was injured, Emma Humble was a married woman and her husband's name is J. K. Humble, and if the plaintiff received an injury at the time set out in her complaint for which she was entitled to recover against this defendants, then her said husband could also recover against the defendant upon the same proof.

To the end that all matters may be settled in one suit, this defendant prays that this plaintiff's husband may be made a party plaintiff.

JOE E. COOK AND
F. H. PENDERGAST,
Att'ys for Defendant.

Indorsed: No. 151. Emma Humble *vs.* Texas & Pacific Railway Co. Motion to (—) party plaintiff. Filed Nov. 14th, 1898. Sam. Gibson, clerk.

Thereupon the plaintiff announced ready for trial, and the defendant announced not ready for trial and made and filed the following motion for a continuance:

Now comes the defendant and says it cannot go safely to trial for want of testimony of Mrs. Virginia C. Skipwith, who resides in the city of Texarkana, within one mile of this court, that she has been regularly subpœnaed to attend and that she is now sick in bed and is unable to attend; that her evidence is material to defendant's defense. We can prove by Mrs. Skipwith that Mrs. Humble, the plaintiff, is a confirmed morphine eater, and highly excitable, and was subject to severe spells of sickness and fainting while at her house, and that Mrs Humble lived at her house just before she claimed to have been injured. That she had a miscarriage while there, a short

while before April 9th, 1898, and came near dying, and was much weaker afterwards than before.

Defendants are informed by Mr. Walker, the son of Mrs. Skipwith thats he is now in bed and unable to attend court; and we have good reason to believe this statement and do believe same is true.

That Mrs. Humble lived with Mrs. Skipwith for some time just before April 9th, 1898, she knows Mrs. Humble's condition better than any other witness.

Application not made for delay but that justice may be done.

We can procure the testimony of said witness by the next term of court. Said witness is not absent by the procurement, consent or connivance of this defendant.

We believe the testimony of Mrs. Skipwith is true.

11 Defendant is a corporation and none of its officers or stockholders are now in this county; and affiant is the attorney for defendant.

Sworn to by—

F. H. PRENDERGRAST,
Att'y for Defendant.

Indorsed: Filed Nov. 28th, 1898. Sam. Gibson, clerk.

The court heard said motion and thereupon the plaintiff acting through her attorney, agreed and stated to the court that the plaintiff would admit that Mrs. Virginia Skipwith, the witness for whom a continuance was sought would, were she personally present, testify to the facts stated in the application for a continuance, but plaintiff did not admit that said facts were true.

The court thereupon, by reason of said admission made by plaintiff overruled said application for a continuance, and stated that the facts stated in said application would be read to the jury as evidence. The court was of opinion that the application should have prevailed if plaintiff had not made the admission as above stated.

The defendant then and there excepted to the court overruling said application for a continuance.

Thereupon a jury was empaneled and the following evidence introduced:

Be it remembered that upon the trial of the above-entitled cause the plaintiff to sustain the issue in her behalf adduced the following testimony:

Mrs. Emma Humble, plaintiff, in her own behalf, testified as follows:

I am the plaintiff in this suit; I reside at Shreveport, Louisiana. Prior to going to Shreveport, I lived at Texarkana for six or seven months, and before going there, I lived at Pine Bluff, Arkansas, for nearly ten years. I was born and raised in Columbia, Louisiana. I am a married woman and have three children, the oldest a girl, Octavia, in her 15th year, the next a boy in his 6th year. I left Texarkana to go to Shreveport on the 9th of April of this year. I went to the Union depot in Texarkana to take passage on the train.

I was going to Shreveport on the Texas & Pacific railway. My three children went with me to the depot to go to Shreveport, where we were going to join my husband. We were going there to live. It was about 8.30 or 9 o'clock at night when we went to the depot to take passage on this train. I purchased a ticket at the ticket office in the Union depot. There is also a waiting-room there for
12 passengers, and my children and myself entered the waiting-room there. When I went into the waiting-room I told the children to sit down and I went to the window to get my ticket and stayed there until I got it, and then went to sit down by my little boy and the seat gave way and I turned to see what was the matter and my head struck the back of the seat, knocking my hat off, and I had only this left arm to do anything with, and I surged, trying with all my might to get out, and (—) boys commenced crying and a gentleman came and assisted me and pulled me out of the seat, and when I got up I could not stand on my feet and held to my little boy. I had not been in the waiting-room but a few minutes when I applied to the agent for my ticket. My children were sitting down before and after I purchased my ticket. I took the seat right in front of the lunch counter to the right, facing the lunch counter, my children were sitting on the same seat. These seats are in benches with separate seats divided off. As well as I remember I took the last seat on that bench on the right, and my children were sitting on the same bench. When I fell down into that seat there were a number of persons in the waiting-room, and they were laughing at me. As to my position in the seat when the bottom gave way, I just fell through the seat and my body was all crumpled up, my right arm was lowest and right foot caught some way, and I turned to see what it was popped and I had only this (left) arm and limb loose, and I surged with all my might to get out of the seat. I dropped down into the chair, with the right arm and limb first, and the left arm and limb to the knee was out. The paper now shown me was handed to me on that night by the colored man that they call the porter at the waiting-room. I do not know the name of the ticket agent there.

(It is here admitted by the defendant that C. E. Swindell was at the time of the injury complained of the ticket agent at Texarkana of the Texas & Pacific Railway Co., and sold the ticket to the plaintiff. It is also admitted that Dr. J. A. Lightfoot was the physician and surgeon of the company at this time.)

After I was hurt I went first on the outside of the waiting-room, and then I went back in there and the ticket agent then spoke to me about it and wrote this note to the physician. I then went out and started to go to the doctor's office, Dr. Lightfoot's. I started to Dr. Lightfoot's because the ticket agent told me to go to him. I did not go to the doctor's. I could not say how long I was caught in the chair before I was released; it seemed quite a long while, I thought nobody would ever come to me. I do not know how many people

were in the waiting-room at the time; there were a good
13 many. I noticed another lady in there at the time, but did not know her. I had no friend or acquaintance in the waiting-room: if I did I didn't see them. I went to Shreveport that night. I suffered from the injury; I suffered acute pain after I went on the outside of the depot and when I moved I would suffer. I got to Shreveport about 4 o'clock in the morning of the same night, the morning of the 10th. When I got to Shreveport I went straight to a hotel and took a bed. On that day, that is the first day after I was hurt, I was suffering. I was almost unconscious from the pain in my head, and could not move my body, and I was also suffering internally. My suffering was in my right shoulder and right arm and the back of my head, and in through my bowels. The pain in the bowels seemed to be located a little below the waist to the left of the middle of the body. The pain was very great; I suffered intensely with it. I sent for Dr. Ford and he came to see me. I sent for the doctor about 6 o'clock in the morning, on the 10th, and I could not tell just what time it was when he got there because I suffered so I paid little attention to it, but I suppose it was about two hours after I sent for him. He administered to me and relieved my pains for a time, but they returned with more intensity than before; and the Doctor returned again next day. I think Dr. Ford made 8 or 10 visits to me. Another physician, Dr. Gray, visited me. They did not visit me together. They made an examination together at one time. I suffer now all the time, only when sitting down or lying down; if I am moving around I am suffering. The pain is more severe at times than others. My means of livelihood for the past few years has been the keeping of a hotel at Pine Bluff.

(The defendant here objected to any evidence as to the plaintiff's diminished capacity to labor, because she is a married woman and her husband is not a party to the suit, and that recovery can only be had when husband is a party to the suit.)

Objection overruled by the court, to which action and ruling of the court the defendant then and there in open court excepted.

For a few years prior to my injury I was engaged in the hotel business at Pine Bluff, Arkansas. I run a boarding-house for something over a year, and then a public hotel for nearly a year. This was last year, just before I came to Texarkana. That was run by me as my sole and separate business, and was run in my own name, both the boarding-house and the hotel, and it was my business.

Q. What services did you render in running the hotel?

14 Objection by defendant because incompetent, irrelevant and immaterial; objection overruled by the court, to which action and ruling the defendant (*the*) at the (—) excepted.

By PLAINTIFF'S ATT'Y: This testimony is offered solely for the purpose of showing capacity of (*defendant*) to earn money.

A. I superintended all the work, seeing to everything, and ofttimes I would take the place of some of the help when they quit

or did not come. The condition of my health was perfect. I was a strong woman physically; no one assisted me in the management of the hotel or boarding-house. I then came to Texarkana and my health was good for a long time until when I went out on Rose hill I had a spell of sickness, which was the first and only sickness I had. That sickness lasted about a couple of weeks. It was something over a month before I left Texarkana that I was sick. Immediately prior to the injury my health was very good, and I was getting better every day, improving and able to do all my work. I am now in my 36th year. After I went to Shreveport and until now I have been unable to do anything much, only just a little at a time, anything I could get to do sitting down. I can sew with my hands only. Cannot use a machine. If I lift anything I am in pain. Just the weight of a chair. If I lift a chair I have to sit down for a long time. Lifting a chair will cause me pain and suffering for sometimes a half of a day and sometimes not so long. I cannot walk about much, cannot walk any distance. I have been sewing and doing little things like that for a livelihood. I have made the living for myself and my children for about four years. They are dependent upon my exertions. I have tried to use the machine in sewing but its effects are such that I cannot use it. If I sew on it 10 or 15 minutes I am compelled to take to my bed. I used the machine before I was hurt and it did not have any effect on me at all. Before I was hurt I would sew all day long, commencing early in the morning and sew sometimes until 9 and 10 o'clock at night, and it did not affect me at all before I was hurt. My sewing now is confined to finger work. Just before I was hurt I weighed 145 pounds. There were no other people sitting in this row of seats when I was hurt except my children. I did not detect anything the matter with the seat until I sat down. The waiting-room was lighted very well. I don't think I was ever in the depot before. This was the regular waiting-room for ladies. I sat down in my usual way. I never suffered prior to this injury with the pain with which I now suffer. The doctors have explained to me how dangerous it is for me to do certain kinds of work, and Dr. Gray told me what was the matter with me—hernia. I never had this hernia before this injury. The trouble that I experience never presented itself to me before this injury. I never had the least symptom of it before this injury. I never suffered with pain in the locality where this now affects me.

Cross-examination:

I think I stopped at the house called the Ruskin house in Shreveport when I got there; it is quite a little way from the depot. I rode there from the depot. I got to Shreveport about 4 o'clock and sent for a doctor about 6 o'clock, and he came to see me in about two hours, something like that, after I sent for him. I did not explain to Doctor Ford about my fall in Texarkana. I just told him I was suffering from a fall; that is all I said to him at that time. I did not explain how the fall was at that time. I do not remember just

what remedies he administered; he sent me some medicine back. He gave me a hypodermic injection of morphine. That is the medicine I stated I took which relieved the pain for a while, but the pain was greater when the effects of the medicine wore off. He also sent me some medicine to take internally, and some to rub on the bruises on my arm.

Dr. Ford visited me 8 or 10 times and then turned me over to Dr. Gray, whom I saw 2 or 3 times. I went to his office twice and he came to my house once. I do not remember the dates of his visits; it was, I suppose, about a month after I arrived in Shreveport, maybe longer. Dr. Ford made the first examination; he did not state that I had hernia. I explained this to Dr. Gray also. I did not have any one waiting on me after Dr. Gray quit waiting on me. Dr. Gray's visits were not right close together; he came to see me once and I went to his office twice. These were some time apart. I first visited his office and he came to my house. The only time he came to my house he came with Dr. Ford. They came and made a joint examination and pronounced it hernia. I have worn a truss and other protection. Dr. Gray first gave me a truss. Dr. Gray's didn't fit, and from that one he gave me I manufactured one myself, which I have since worn. I did not call in any physician to have one made to fit me. After I was injured in the waiting-room the porter was sent with me to see Dr. Lightfoot. I did not go to his office; I went up on the corner somewhere near the opera-house. I think I went to Smith's drug store, which is on the corner below the opera-house. I went to some drug store, but am not sure that it was Smith's, and applied for remedies—a bottle of liniment. I did not apply this to my injuries on my arm and head. I sent it back, as I had no chance to use it at the depot and I did not want to miss the train. I do not know how long it was after I was injured until the train left which I took; I don't think it was very long. I
16 knew there was a train making connections for Shreveport going in the daytime. The reason I did not wait for that day train is that I had bought my tickets for the night train and I was anxious to go to my husband, and more so after I was hurt. While in Texarkana I lived with Mrs. Davis and boarded there a while and with Mrs. South, and I started to keep house myself. I started to run the old Iowa house. I think I stayed there about two weeks; that was when I first came to Texarkana, about October, 1897, when I left Pine Bluff. Then I boarded at the Commercial hotel with Mrs. South; stayed there I think 4 or 5 weeks. I didn't have any doctor visiting me while I was there. I then went to the Iowa house and stayed there about two weeks. I didn't have a doctor while I was there. Then I went to Mrs. Davis'; had no sickness there; stayed there two weeks or more, and then went to Mrs. Skipwith's and boarded, and stayed there 5, 6, or 7 months—until I went to Shreveport. I had a spell of sickness at Mrs. Skipwith's. I did not consider that I was so critically ill there. I had two doctors attending me, and they came to see me several times; I do not remember just how many times. I did not think I was dangerously ill; I did not know whether I was so or not. I do not think there was any

morphine injected in me hypodermically. I did not have any occupation while I was boarding at these houses, Mrs. Davis' and Mrs. Skipwith's. My husband preceded me to Shreveport. I went there for the purpose of making that my home. I gave up the hotel business—that is, running the hotel myself—three or four days before I left Pine Bluff; something like that. I had a severe spell of sickness in Pine Bluff that rendered me incapable of running the hotel for a few days only. I suppose this was about nine months before I left there. I kept hotel there right up to the time I left and did a great deal of my work. I was sick up there not quite two weeks. When I stated that after buying my ticket I took my seat, the last seat, I mean I took the end seat on the bench, not the last seat in the house. I had seen Mr. Ables, the man who kept the lunch counter, a time or two before that night. I had never seen Mr. McConnell before. I have no regularly manufactured truss and have had no doctor since June 4th, 1898.

Redirect examination:

I do not know what was the direct cause of that spell of sickness I have been asked about which occurred about nine months before I left Pine Bluff; I had what is called abortion—had a miscarriage. That confined me about two weeks. I recovered from that at once and my health was as good afterwards as before. The sickness I had at Texarkana was about a month or something over be-
17 fore I went down to Shreveport. My trouble here was the same or something like the same I had at Pine Bluff. I was recuperating when I left here, was getting stronger every day. I have three children that are living.

WILLIS ABLES, for plaintiff, testified:

I live in Texarkana; I knew Mrs. Humble before she was hurt. At the time she was injured I was tending the lunch counter at the Union depot for Pratt. The waiting-room for white people is on the east side, the ticket office is south of the lunch counter, and the water-closet, ladies' toilet-room, is north of the lunch counter; the white waiting-room is east of ticket office, lunch counter and toilet-rooms, and the colored waiting-room is west of them. Through the middle of the building there is a ticket office, lunch counter and toilet-rooms, and on the east and west of these, the white and colored waiting-rooms. Standing in the lunch counter I have full view of both waiting-rooms. The lunch counter is about three feet high, I suppose. When Mrs. Humble first came into the waiting-room, as well as I remember, she walked around the waiting-room to the north side, and then came back and sat down on the seat and it went through with her. I did not see her when she bought her ticket. The first I saw of her she walked to the north side of the room and then sat down. The chair in which she sat down is in the north side of the waiting-room, in front of the lunch counter. With reference to the lunch counter, about half of this seat is in front of it and the other half in front of the stove. I was in full view of all the

seat. She sat down in the seat and it went through. When she sat down it went clear through with her; she made some efforts to get out, and it seemed she could not get out by herself and some man, I don't know who he was, came and helped her out. I would call the position of her body when she went through the chair kind of wedge shape, her knees were up to her breast like and her body had gone through the chair. She was in that position two or three minutes, I suppose. She was making efforts to get out the best she could. She tried with her arms and seemed to be trying all she could to get out. I do not remember exactly how many people were in the waiting-room, it seems to me some 18 or 20. When she was in that position most everybody was laughing—I was myself. I noticed her push her dress down once or twice, it was exposing her limbs a little, and she was trying to keep them from being exposed, and making efforts to get out. I had known her some two months before this occurred. She had two children with her. I do not know whether she has any other children or not; one was a girl and one was a boy. The girl's name was Octavia and she was with
18 Mrs. Humble that night. When Mrs. Humble sat down Miss Octavia was in the south side of the waiting-room, just above the door leading out on the platform. I do not remember where the boy was. The first I saw of Mrs. Humble she was walking toward the north side of the waiting-room and looking out the window, and then she came back and sat down in the seat by the stove. The seat was in bad condition at that time. As near as I can describe it the seats were something like this one I am sitting in, with arms, and the seat is of perforated wood tacked at the bottom, sides and top, and the tacks had come out or were not in it at all, and when she sat down in it the whole business went right through. When the back and bottom were in position there was nothing to indicate that the seat was in bad shape. You could place the back and bottom in the frame and it would look all right, for the boys had been fixing it to catch the boys who came around. The seat had been in bad shape for a couple of months. Mr. Thos. Heston, who has charge of the station, I mean the whole business down there, had been notified about the seat. He was the superior officer at Texarkana. I told him about the seats myself several times, and others spoke to him about them, and he saw them himself and looked at them. They were never fixed up to the time of this injury that I ever noticed. I gave my deposition in this case about a month ago. I made a statement in that deposition that I had notified Heston and that he had made an examination and found out the defects. I do not know where Mr. Heston is now. (Witness here handed photograph of the seat, and after examining same says:) This is correct representation of the bench in the white waiting-room, through which Mrs. Humble fell at the time I refer to.

By the COUNSEL FOR DEFENDANT:

Q. Was the picture taken with the seat where it was when the lady sat down in it?

A. No, sir.

Q. Do you know that this is the seat that was there?
A. Yes, sir; because I know the seats; I work down there.
Q. Are they not all alike so far as the photograph would show?
A. I saw this photograph taken myself.
Q. Where was the seat when it was taken?
A. In the colored waiting-room.
Q. It was not at the place and does not show the situation at the time she was hurt?
A. No, sir.

By PLAINTIFF'S COUNSEL:

Q. Who put the seat in the colored waiting-room?
A. The porter, after this accident occurred. I do not know how long, some 8 or 10 days. I know this is a photograph of the seat; there was no other seat broken out at the time. The last
19 seat on the end of the bench was broken out; the seat to the right represented the seat with the bottom broken out, and the other seats on the same bench have the bottoms in, but before Mrs. Humble sat down this seat had the same appearance as the others on the same seat. The back and bottom is one piece of perforated wood, and when she sat down it went right through. This photograph shows the tacks along the edges of the perforated wood by which it was fastened to the frame of the bench. I suppose the perforated wood is $\frac{1}{8}$ or $\frac{1}{4}$ of an inch thick and this is the part that gave way.

Cross-examination:

My deposition was taken in Scott & Jones' office, about a month ago. I saw this photograph at the time. (Witness here shown diagram.) This diagram was shown to me at the time the deposition was taken.

Q. Didn't you see me mark that seat as the one you swore to, with my pencil mark that cross on it?
A. I don't know.
Q. Didn't you say it was the one next to the end seat?
A. If I did I was mistaken, because it was the end seat that broke; maybe I did so; I won't be positive.
Q. Didn't you see me mark this diagram in your presence?
A. I remember some one marked it there, I don't remember whether you are the man or not. I remember you were there; I remember you gave me a diagram like this. I remember you marked where the stove was and where the seat was. I don't remember you marked with a pencil a cross on the seat. I stated she went through. If you marked it I don't know that I could be mistaken as to the one you marked. I had known Mrs. Humble about two months. Mrs. Humble knew me pretty well. I stated a while ago that I laughed when she fell, and others laughed. I hardly think I would have laughed had I known she was seriously injured. I might have done it. Her daughter laughed also. When I said the boys fixed this seat to see the kids fall through I mean the kids would fix it up and get some little fellow to sit down in it. The

boys did this every night for a long time. My employment was at that lunch counter, and I worked one week days and one week nights, and I saw this going on when I was on watch. It was not anything to me that it was liable to hurt people. I was there where I could see them all the time, but I had no right to call them down for it; they had a policeman there for the railroad. I have seen the boys fix that broken seat. I do not know that the wood was entirely loose, or that all the tacks were loose, prior to the injury to Mrs. Humble. There might have been three or four tacks in it. The tacks could be in the front and the top of the back come down. Mrs. Humble came in there and I saw her there and gave her no information about this seat. I didn't notice her until she went to sit down. I don't know whether I first saw her when she came into (*to*) the door or not. I did not give her any warning of this seat, which was (—) deceiving her because I did not know she was going to sit down. There are four seats on each side of the bench, which makes eight to the bench, and there are three or four of these benches, and I suppose 30 or 40 and maybe 50 people could sit down in there all right. I didn't warn anybody about this seat. I had seen the boys and several others fall through. I told this in my examination in Scott & Jones' office about the boys fixing this trap; I don't know whether they put it down or not. I told it to the man who took my deposition, just like I have told it here, that the boys would fix the seat and get other boys to fall through—that is it seems to me I did. This seat was right at the stove and part at the lunch counter, and was about 2 or 2½ (—) from the stove. I do not remember whether the seat next to this one had the bottom out of it or was defective in any way or not. I never noticed it if it was, but this seat has been this way for some time. This photograph does not show that seat with the bottom in it, and does not show the seat as it appeared at the time. I suppose it may be 7 or 8 days, don't remember exactly the time, it may have been 5 or 6 days prior to Mrs. Humble's getting hurt that I last noticed the condition of this seat. In the seat shown by the photograph the back and bottom are entirely gone. The way I know the condition of the seat when Mrs. Humble sat down in it, when I had not noticed it for 7 or 8 days is that after she fell through I noticed the bottom was not put back in. I knew there was a seat out of fix but did not know it was this particular one. It looked apparently all right when she sat down in it. I mean I noticed the seat 7 or 8 days after the accident. I noticed it all the time at the accident. I suppose it was the night before that, prior to the accident, that I last noticed the seat. I went off in the morning. I noticed it because it was right in front of me. I noticed it the night before she was injured. The bottom was entirely out. That night I noticed it several times, and they had several boys fall through it: the top was loose and it had some tacks in the bottom and when you sat down it would go through. They had some boys to sit down in it the night before this injury. The condition of this perforated bottom when the boys first commenced to play with it was that the bottom was still nailed, and the top of the back was loose. This

was the next seat to the stove. I never saw them put the poker in that seat when the perforated wood was down, after the boys had fixed the fire.

21 Redirect examination:

I was employed by Mr. C. R. Eisle, Pratt's manager down here, and was not employed by the railroad. I notified Mr. Heston of this seat. It is my understanding that Mr. Heston had charge of all the properties of the Texas & Pacific R'y at this station. He allowed it; these boys and this seat; that is, they never made any effort to fix it. When I notified him of it he never said anything of it at all; he just went around and looked at the seats and went out. I suppose it was two or three weeks, maybe a month, prior to this accident when Mr. Heston looked at them. I stated that when Mrs. Humble came into the room I didn't think of the seat at the time; I didn't know whether the seat was in bad shape or not; didn't know but what it had been fixed up; it apparently looked all right. At the time I laughed at her when she sat down, I did not know that she was injured. It is my understanding that Mr. Heston was the joint agent of the two companies here.

Cross-examination:

Heston was the agent down there; he was employed by the Iron Mountain and Texas & Pacific, I think. I do not know that he was employed by the Texas & Pacific. I think the Iron Mountain employed him and paid him also, but he had charge of the whole property. I am not employed at the lunch counter now; left it about two months ago; am now tending bar at Tony De Grazier's.

Mrs. EMMA HUMBLE, recalled for plaintiff, testified:

The physician who attended me during my illness at Pine Bluff, about nine months ago, before coming to Texarkana, was Withers. Had no other physician.

Cross-examination:

He did not have a partner; if he did I did not know it.

Dr. T. G. FORD, for plaintiff, testified:

My profession is that of a practicing physician and surgeon. I have been practicing medicine since May 6, 1870; all of that time at Shreveport. I am a graduate of the Philadelphia Hospital and Medical College in that city. I know the plaintiff; first met her April 11 of this year. I saw her in the capacity of a patient. She was in bed with fever—temperature 102—tenderness over the abdomen, and particularly so on the left side. There were some bruises apparent on the side of her face, on the shoulder and the arm. I asked her if she was suffering very much, and she said: Yes, sir; a good deal; and she had received a fall or injury at Texarkana, and spoke about falling through a chair or something of that
22 kind. I did not attempt to make an examination, but found her very restless and nervous, and I told her I would give

her something to reduce her temperature, and after that was reduced she was to take a dose of salts and some phenacetine, and I would call the next morning. She remained under my treatment about seven or eight days, possibly more than that. On my next visit to her, I found that this soreness and tenderness continued, and I thought possibly, from the fall that she had described, that it might produce a bad effect upon the uterus and upon (*upon*) one of the ovaries. She submitted to an examination, and I found one slightly gorged and out of place. I was not satisfied, and told her I would return that evening, and when I returned I found her fever better and the tenderness somewhat better. I told her I would return the next day and make the examination in a standing posture, and found that the ovary was not dislocated and the uterus was in position, but there was still a tenderness she complained of from the first time I saw her. She complained of pain in the left abdominal region. The reason I ceased to treat her and she became the patient of Dr. Gray, was that my daughter was in school in Washington city and I had made arrangements to leave for that place early in May. I saw Mrs. Humble would need some one for quite a length of time, and I told her to get another physician and recommended Dr. Gray. I saw Mrs. Humble afterwards, with Dr. Gray, and found that she had an oblique inguinal hernia. I ascertained this from my own careful examination. The results to be apprehended in the case of hernia in a person of Mrs. Humble's age are, that it would not be curable, it would be lifelong, and the danger of strangulation in all cases of hernia, that could be avoided only by reducing the hernia and wearing a proper truss. A truss will prevent the danger of strangulation, but will not cure hernia. Troubles of this kind are cured sometimes by operations. As a physician, I would not advise that for Mrs. Humble. Beyond a certain age I do not think that one is justified in hazarding one's life upon the idea of a theory. I think it would hazard her life. After 40 years of age, I would never advise such an operation. And also, there is no case of hernia where the hernia is not reducible, and you can hold it inside. The cause of strangulation, spoken of, is that the gut goes down through the canal, passes through this opening in the cavity and wall and becomes constricted and cannot go back, and you cannot get any action on the bowels. This constriction around the gut, unless interfered with by operation and releasing the gut, would cause death. The truss is purely mechanical; after the hernia is reduced and restored to the abdominal cavity, the truss is placed to hold it in position. As I have stated, I afterwards examined Mrs. Humble, in company with Dr. Gray, and found this hernia existed. The
23 reason, in my opinion, I did not find it on my first examination, was that sufficient time had (—) elapsed for it to break its way through so that it could be seen and felt. Hernia is not a common thing with females, and I cannot say that it is with males, except with the class of working people who lift a great deal and who are standing upon their feet. In females, the most frequent character of hernia is the femoral hernia. The most common causes of inguinal hernia are lifting, straining, violence—more often from

violence—but they do come on sometimes from a weakened state of the abdominal wall.

Q. Granted that the lady would take a seat like what you see in the picture there, no protection, and should fall through a seat like that, the natural position she would find herself in in her struggling to get out, would hernia be the natural, logical result of those struggles?

A. I should think so. The hernia I found on my examination of the plaintiff was on the left side and passed through what we call the internal abdominal wall, and directly through the canal and down the external wall and found a large tumor, I suppose half the size of an orange; not quite that but I should say the size of an egg, and it is oval in shape.

Q. What will be the effect or result of that on Mrs. Humble's general health?

A. You mean on the working capacity?

Q. Will it cause suffering?

A. It will cause suffering, and you have to be careful, if you don't it will come down and large quantity of bowels protrude through this canal and cause strangulation. In regard to ordinary housewifely duties, she would have to be very careful, unless a truss is worn, and even then, when the truss fits properly, she would have to be on the *qui vive* all the while, if not it would slip. I should say that this would diminish her capacity to earn to the extent of fully one-third, may possibly one-half. In regard to her neck, shoulder and arm, they were temporary; after a certain length of time they gradually went away. They caused some pain; she complained of tenderness and the parts were swollen.

Cross-examination:

The commonest kind of hernia with women is called femoral hernia; with men it is inguinal hernia. There are many persons affected with inguinal hernia who go about their business by wearing trusses. And if the truss is properly fitted on the person and is kept there, they can perform their ordinary duties. I have some 2 or 3 patients who wear trusses, and who perform manual labor. If a truss is properly fitted to the parts, the pain accompanying hernia is more from the truss to keep it in position; it will
24 slip and you have to go about constantly keeping it in position; it is the hardest thing in the world to fit a truss without injuring the hip or the abdomen. And again there is danger of the bowels slipping.

Q. Is there any pain if the truss is properly adjusted and kept there?

A. One of my acquaintances tells me they are a constant source of misery; it may grow out of the unnatural, uneasy feeling they have. I first saw Mrs. Humble on the 11th of April. I think I treated her about 7 to 10 days. When I quit the bruises had disappeared on her shoulder and arms. If a person fell through the chair as shown in the picture, I should think it would have a tend-

ency to bring the thighs right up against the weak part of the abdomen, particularly if one side went down first. I do not say that if a person got in a position with their thighs against the abdomen it would not tend to protect the weak parts; that would depend on the position taken, as they might be so placed as to press the abdomen to the center between them. As to miscarriages and premature births tending to weaken those parts which give way in hernia, I never saw it in my life; it is said by best authors that child-birth sometimes does it. There are a large number of hernias which are not produced by any external violence to the person. These are produced by straining and lifting. It is a fact that they come on gradually rather than being produced by any sudden conditions. The books lay down the proposition that inguinal hernia is very largely a disease of occupation as distinguished from injury, particularly with that class of persons straining and lifting all the time. It is the fact that the occupation of persons is very largely the cause of inguinal hernia. The cause of my going to see Mrs. Humble on my return, after I had given up the case, was that some one told me, I forget who, that Dr. Gray had found this hernia, and I told the parties that I would go up and see Dr. Gray and Gray said yes. I told him I wanted to see it and we appointed an hour the next day to see it and we went to her house and got her to cough to force the hernia down gradually so you could see it. I had not discussed the matter with any one as to whether or not she had a hernia. I went there for the simple reason that I had seen her before and made this examination, and did not find it. At the time I looked for almost anything when I first called to see her; I thought it was a dislocated ovary or inverted uterus, but I could find nothing of the kind or any cause for the pain. I did not have the hernia in my mind at that time. We there decided it was necessary to make her stand up. The jar sometimes will lower the uterus at that temporary stage of prolapsed condition, and I thought perhaps these pains were caused by that. You see when one is in a recumbent position the uterus will gradually tend backward, and I wanted to see if it had been thrown out of position or been displaced. This hernia might have reduced itself by her lying down, but in this case I replaced it. The rupture or tear is in the wall of the abdomen upon which the bowels press and if there is a sudden strain or a weak place in the wall it gives way and the protrusion takes place gradually. This protrusion had come through these muscles and walls that I speak of. This hernia is what would produce what (*what*) is called labial hernia in the books; it would result in that; it has not got to that point yet. There is a right and left labia, it is the right and left side of the protection of the vagina corresponding to the scrotum in the man's hernia.

Redirect examination:

Q. If I understand you correctly, you stated that hernias were sometimes the result of accidents, some sudden powerful straining, and sometimes acquired from natural causes; in the female the

hernia acquired from causes other than accidents, of what character would that hernia probably be?

A. Femoral or labial hernia.

Q. Granted that any woman has inguinal hernia, it would in all probability be the result of some accident?

(—.) Undoubtedly so, some accident or violence.

Q. What led you to suspect misplaced uterus or ovaries?

A. Constant pain and tenderness over the ovaries.

Cross-examination:

When I speak of accidents or violence as causing inguinal hernia, I class heavy lifting and straining as violence.

Dr. R. A. GRAY, for plaintiff, testified:

My residence is Shreveport, Louisiana. I have resided there since 1853. My profession is the practice of medicine. I have been practicing medicine since 1853, about 45 years, a little over. I practiced all that time in Shreveport, with the exception of the time I was in the army, about 13 months. I am a graduate of the University of Louisville, Kentucky, spring 1853. I have met Mrs. Humble three times previous to today, and know her slightly. I first saw her on the 3rd of May; she called to consult me late that afternoon. She told me she wanted to consult me about a hurt she received and indicating with her hands the lower portion of her abdomen, and I understood her to say she had fallen from or through a chair and she said there was a lump there. It was late in the noon, and I told her the examination would be necessar. in-
26 strumental and it had better be deferred until the next day, and she called around the next day about 10 or 11 and I made an examination. Had her lie upon a couch and I first examined the abdomen and could see a tumor, a pear-shaped tumor, in the left groin which, by manipulation, I discovered was an oblique inguinal hernia. I did not pronounce upon it until after I had reduced it, and when I returned it, it went back with the characteristic gurgling sound. I remarked to her, "You have hernia, how long have you had it?" She seemed somewhat surprised and replied she did not know she had hernia. I had her then raise to her feet to see if it would return, which it did, aided by coughing. I had her to cough several times and the hernia returned. The coughing is done to facilitate the escape of the bowels through the rent. I wanted to see if it would come out and had her to facilitate it. I had her to lie again on the couch and reduced it (*to*) the second time, and told her that she would have to wear a truss. What we call hernia is not curable in an old subject. I mean to say it is not curable by a truss in an old subject—sometimes it is in a young subject. Take a woman 36 years old, it is considered incurable by a truss—there is a radical cure that sometimes cures—a surgical operation. I advised this lady against an operation on account of her age and the condition of the abdominal muscles. I would not like to say that hernia that this patient is suffering from is incurable by local operation, but I would not ad-

vise it; it would be hazardous, and in the attenuated condition of the muscles of a woman of her age who has borne children, the probabilities are that it would not be a success. Under all the conditions, that operation would put her life in danger. She will have to wear a truss all her life. The wearing of a truss is attended with some pain and discomfort, some suffer more than others with it. The wearing of a truss would be a constant source of uneasiness and discomfort, and incapacitate her to some extent from performing household duties. I do not know what proportion or to what extent she would be incapacitated, probably ⅓. She would be incapacitated from all kinds of active work, standing, lifting, stooping, walking, getting about. I think it would have some bearing upon her ability to operate a sewing machine, because that calls into play muscles that have their origin near the affected region, any kind of straining would be hurtful. Getting back to my examination, I advised her to wear a truss and went to a drug store to get her one. I selected three but was unable to get a suitable one—got three of the most proper ones I could find and returned to the office and fitted one on her; it was not exactly suitable and did not fit her very well, and I told her it was the best we could do in the market at that time and if she could make out with it.

27 In a short time she returned the truss and said it hurt her and she thought she could manufacture something that would keep it up as well as that truss did, and she left it, and I didn't see her any more until some time afterwards I visited her with Dr. Ford and we made another examination to see what the situation was, and we forced it down as it was when I first saw her. I have already stated the character of the hernia—it was a left oblique inguinal hernia. I could not say exactly when this examination with Dr. Ford was made, probably a week or two after I fitted the truss. The only way that I had of getting at the date of her first visit was by going to the drug store and looking at the entry made against me for these three trusses. When I first saw this hernia it had the appearance of being a perfectly recent one. I judge from the fact that it was easily reduced and that there was no thinning of the tissues. Granted that the hernia had been received on the date that she told me the accident happened to her, it was about three weeks or a little over, and I think there had been ample time for any soreness to have subsided, and I did not see anything incompatible with the theory of its having occurred then. Granted that a lady would fall from a seat of that character, the position that she would find herself in and her struggles to extricate herself, I would not like to go so far as to say that it would logically be expected to produce hernia, but much less falls than that have produced hernia. The physical exertion and efforts to extricate herself would have a tendency to throw out hernia, that is the tendency would be to create hernia, but I don't want you to understand me as saying that any woman falling through a chair like that and I being present would expect to find hernia, but it might produce it. The most frequent causes of hernia of the character I pronounced this to be, are all kinds of straining, efforts which cause the abdominal muscles to press violently against the

bowels, such as lifting, jumping, running, etc. Hernia is frequently produced by accident or external force or violence, and it is sometimes (*congentinal*) defects in the canal in early infancy, and later in life there is a predisposition formed by frequent child-bearing which has the effect of stretching and thinning the abdominal walls. Femoral hernia is most common in women. I think that comes from the thinning of the walls of the peritoneum, by frequent distentions such as a woman undergoes in child-bearing, and also from age; as a person grows older the muscles become relaxed and the bowels sink down into the abdomen and press upon these parts, distending them and thinning them.

Q. Is it from this cause as a general thing—granted that a woman is suffering from hernia, and that not acquired by some
28 physical violence, is it not a fact that the hernia in that way would be femoral or inguinal hernia?

A. The opinion among surgeons is that it would be femoral. I must say that I have not seen enough cases to form a rule; the consensus of opinion is that it would be most likely femoral. It is a rare occurrence to find inguinal hernia in females; I think femoral is more frequent.

Cross-examination:

I do not think that premature child-birth would weaken the parts affected in hernia more than natural delivery, for the reason that it is the distention of the abdominal wall that weakens it, and the larger the child the more the distention. If there is more than one premature birth it would not indicate that the parts are diseased there. It might indicate one of two things (or some trouble in the uterus itself) and a woman gets into a sort of habit of abortion at some periods, for instance, about the 3rd or 4th month, when they are apt to miscarry, if at all. I do not think that this would weaken the parts involved in hernia as much as natural birth. If a person were to fall through a seat, as Mr. Thatcher explained, it would depend upon the position of the body and limbs as to whether the limbs would be naturally brought against the lower part of the abdomen in such a way as would tend to protect the parts involved, and it would depend upon how the force was applied as to the protection it would afford. If she had known she was going to get the fall and placed her knees in place, it is more than likely it would have prevented the escape of the bowels. I think the thighs and knees being thrown in front of the body in such a fall might have a tendency to protect the parts involved in hernia, provided it was applied in the proper way; she might have gone down in a different position, it would depend altogether on the position she assumed as to the support from that source. After Mrs. Humble called on me at my office the second time when I made the examination and got her the truss, I did not see her any more until I went with Dr. Ford, except that she returned that evening, returning the truss, an hour or two after I gave it to her. Then I saw no more of her until the day Dr. Ford and myself went to see her together. The reason I called in Dr. Ford to interview her was that Mr. Thatcher asked

me if I would not go up with Dr. Ford and examine her and see if she was in the same situation then as when I pronounced it hernia; she was not my patient, but I knew nothing of her having been a patient of Dr. Ford, she did not tell me that. I do not know whether or not she had any other physician then or not. Taxis is the technical term for the manipulations you go through to reduce hernia to place it back.

29 W. L. CHEW, for plaintiff testified:

Q. Did you make an application to me as attorney for Mrs. Humble, did you request that she submit herself to an examination by a physician of the railway company's selection in Shreveport?

A. I think that I asked you if our surgeon might see her and examine her, I believe you consented. I then afterwards saw the physician of the company—Texas & Pacific R'y in Shreveport, and asked him to examine Mrs. Humble. That was Dr. Cody. I never saw him afterwards. My position is that I travel for the law department of the T. & P. R'y Co. I think the only written report that Dr. Cody made was a letter to me; I have never seen any further written report than that.

Mrs. EMMA HUMBLE recalled for plaintiff testified:

Dr. Cody made an examination of me. I think it was in July as well as I remember. I did not call him to make the examination, and did not represent to him, or to anybody else, that I desired him to make an examination, and it was not at my request.

J. T. FERGUSON, for plaintiff testified:

I am local freight agent at Texarkana for the St. Louis, Iron Mountain and Texas & Pacific railways; I am joint local freight agent. I do not consider myself an officer of the road, just the superior agent here; I receive the reports from all the departments except the ticket department. I succeeded Thomas Heston. He held the same position here that I now hold, I think. I was at the checking out of his position, and followed him in the same capacity. The Texas & Pacific and Iron Mountain railways have only one ticket office in the union depot, and one agent. I have acted in the ticket office while Swindell was out, and at the time was there that is the way I conducted it. I am often at the ticket office several times a day, and again not there at all. As to whether the Iron Mountain and T. & P. have a joint waiting-room for whites is a matter that is not given to me to decide, but they use the same rooms; they have separate waiting-rooms for blacks and whites to comply with the State laws; they have but one room for white and one for colored persons; am not employed by the Texas & Pacific; I receive my pay from (*from*) the Iron Mountain and am subject to its employ and discharge. As agent for the Iron Mountain I attend to the business for the Texas & Pacific. As to whether the two roads bear jointly the expenses of this yard I am unable to state; if it is done, it is done elsewhere and not in my office. I have heard it said by railroad men that they do.

Whereupon the plaintiff rested.

30 The following evidence, by deposition, was made by plaintiff:

JOHN W. WITHERS testified: I am 43 years old; reside in Pine Bluff, Arkansas, and am a physician and surgeon, and have been for five years. I know Mrs. Emma Humble. I was called to see her, professionally, and found her *flooding*. She had a severe hemorrhage, the result of a miscarriage. I think the cause of the miscarriage was overwork. She complained of having a great many boarders to look after. I saw her only once after that; she came for a health certificate. She was then apparently well. She apparently gained her health and strength after the miscarriage of which I speak. She kept a boarding-house, and she conducted her boarding-house subsequent to her miscarriage. The miscarriage might have been caused by other causes than stated above.

Dr. P. H. PENDLETON testified, by deposition, for plaintiff, as follows:

I am 46 years old; am a physician and residing and practicing at Pine Bluff, Arkansas. Have practiced there for some years. I knew Mrs. Humble for about two years beginning, probably, five years ago. I was her family physician, but never attended except in child-birth; about five years ago, when she gave birth to twins. I did not discover any hernia. If she had then had hernia it is probable I would have discovered it. She did not mention having a hernia. Her health was then good. Hernia is usually congenital, but it might be caused by straining the abdominal muscles. If a person were in a position with the knees and legs forced up against the stomach, this, to a certain extent, would tend to protect the parts where inguinal hernia appears, and it would not tend to cause inguinal hernia. Yet, it is altogether possible for a person in such attitude to acquire an inguinal hernia.

Thereupon the defendant, to sustain the issues in its behalf, introduced the following testimony:

ED. MCCONNELL, for defendant, testified:

My name is C. E. McConnell. About the 9th of April, 1898, I resided in Texarkana, and was working for the "Texarkana Call" as city editor of the paper. I was at the depot when Mrs. Humble had a fall there. She sat down in a seat in the waiting-room and went down through it. It was a broken seat. The bottom of the seat is made of a kind of cane or wood, and it was broken, and part of the piece was gone. It was a perforated bottom. The bottom looked like something had gone right down through the middle, and in the sides running into the hole in the center some of the pieces had been taken out—some of them, I guess, one-half and some one inch wide. This seat was situated about three feet from the stove.

31 I made a minute in my book at the time of the accident and have that book here. I have two entries in my book, the first merely mentioning that they were going away to Shreveport; and I expect half an hour after I had been there, the accident hap-

pened, and I made an entry about the accident, I merely asked Mrs. Humble if she was hurt before I made the entry as to the accident. There was a whole crowd there, and the only answer she would give was that she was more scared than hurt. I can tell from my entries that that is the way it happened. Before she was injured I saw Mrs. Humble some 25 or 40 minutes; she was sitting down in one of the seats on the other side of the waiting-room, and I saw her all during the interval, sometimes standing up and walking around the floor, and when she fell she had gotten up and went across the waiting-room to the northwest corner; she had been sitting before that in the southeast corner of the room when I first went into the depot. I did not go to her when she fell. I started to her and some other gentleman got to her before I did, and helped her to her feet. I was 15 or 20 feet (—) her when she fell. Some stranger helped her out. I do not know the exact time between the time she fell in the seat and the time she was helped out; it was several seconds. When she fell (*to*) stove was right to my left, and in order to get to her I had to go to the left, and this man was right close to her, and as I walked along the length of the lunch counter to get to her, he helped her out, and when I got there she was standing up. I don't know whether this man helped her or she got out herself. I know she was asked if she was hurt, and she said no, she was scared worse than she was hurt. This broken seat was right near the stove, and I have noticed that sometimes the poker was standing up through the hole, and I remember at one time of picking a piece from the bottom of the seat and whittling it. This was the same seat that she fell through. The seat was right near the stove.

Cross-examination:

The first person I talked to about this thing after the accident was Mr. Beard, the proprietor of the paper, up in the office that night. I do not know whether it was Sam. Solinsky or Mr. Ayers, among persons interested in the suit to whom I first talked about it. I prepared a written statement of the matter for the railroad, but did not give it to Mr. Ayers. He was the first man that I saw about it. I did not know Mrs. Humble personally before that night. I had known of her for seven or eight months—had mentioned her several times with parties at her house. There may have been 7 or 8 parties in the room at the time. I don't expect I can identify more than 4 or 5. May have been half a dozen—Mrs. Humble
32 and her daughter, and the man I spoke of who tried to assist her out, and the lunch-counter man and myself. These are all the persons in the waiting-room that I remember. My attention was attracted to her getting up and walking around the waiting-room and going to this other seat, by the way she was walking around. There was nothing peculiar about it. I go to the depot at night to see (*to see*) the ticket agent to ask him about who is going away, and if any one comes there while I am waiting for the ticket agent to get a ticket or something, I fall back and lean on the lunch counter and then I am facing the waiting-room. Mrs. Humble

passed me several times while I was in that position. I did not see her ticket. I do not know exactly how long this seat had been out of repair, I expect as much as two or three weeks. This seat used to be in another part of the waiting-room, and it was brought near the stove to be out of the way. It was placed right near the stove It was the first row of benches to the left of the lunch stand. If the stove was red-hot it would be impossible to sit there, and if the stove was not very hot and it was a cold day a person could sit there. I know that they put it there to put it out of the way only, from what the porter said. There was one more seat there out of repair, it was in a worse fix than this one. I think it was right near the closet at that time. I cannot say that there were no seats in that waiting-room in which this perforated wood was not loose at the top and bottom so it would slide out. I do not know whether this seat was loose at the top or not. There may have been half of them loose and I would not have noticed them. I was not exactly on the other side of the stove from Mrs. Humble when she fell, but when I started towards her I went around the stove. The hole in the bottom of the seat was 3 or 4 inches across. It looked like something had been driven through it, and was large around as an ordinary tumbler, and it looked like something had been punched down through it. I remember seeing a broom stuck in it one time. I did not see Mrs. Humble when she first went in there—she was in the waiting-room when I went in, she and her daughter. I have stated that she said she was more scared than hurt. I do not know who else heard that, every man in the crowd could have heard it; her daughter and the man who helped her out, and I expect Mr. Ables could have heard it; he was not over 6 or 7 feet away; she spoke it out loud like she was speaking to the crowd. When she first got up out of the chair she seemed excited and nervous. She made this remark when I said "I wonder if she is hurt," and this man said, "I don't know whether she is or not." She spoke up and said "I am scared worse than (*than*) I am hurt," or something like that.

33 Dr. G. C. ABELE, for defendant, testified:

I am a practicing physician at Texarkana; have been such since 1889. I know Mrs. Emma Humble. I first became acquainted with her some time in Jan., probably of this year. The circumstances of the first meeting with her was that I was called to see a case in the house where she was living at the time, and I met her, as well as I remember, and had some little conversation with her. She consulted me then about her condition, but I didn't prescribe for her or make an examination of her. We agreed that she should come to my office and I would examine her, but she never came. Subsequently I was called to see her and treated her, I could not say how long after that, probably some 10 days or two weeks. I did not go immediately upon being called as I had another engagement. I do not know whether I received a second call or not, but they told me if I could not go then to go as soon as I could. I went as soon as I could and found she had another physician. She

had been losing considerable blood—she had a miscarriage or premature birth. Dr. Collum was the other physician. She was in rather a weakened condition at that time from loss of blood, and almost in a state of collapse. She was relieved to some extent in a short time, but was not out of danger for some days. Dr. Collum and myself continued to treat her for some 8 or 10 days, as well as I remember; I attended on the case after he withdrew from it, as I was first called to see her. I do not know whether she (—) any disease like hernia at that time or not. I did not examine her for hernia, only for miscarriage. I do not remember how many days I continued to treat her; I went to see her until she was practically in a normal condition. I do not remember seeing her after she got out. I remember seeing her before she had that spell. I could not say as to her condition then and now, as I only saw her once before she got sick, and then I saw her while she was sick, when she looked very much worse than she does now. I did not administer to her any morphine or any drug like to ease her that I have any recollection of. I could not say about how many days that I considered her in danger; of course the danger was greatly diminished even the first night after the hemorrhage had ceased, but we didn't know whether she would get over the shock. As well as I remember the sickness was in Jan. of this year—my books will show when I treated her.

Cross-examination:

I never treated the plaintiff before Jan. for anything. I don't remember how long I treated her, I should say something like
34 two weeks. She had a miscarriage and hemorrhage and we were called in to treat her for that condition. I do not remember how long it took to stop that hemorrhage, we were there (*there*) for an hour or such a matter. When I quit visiting her I considered her out of danger. I don't remember ever having seen her after that time. As well as I remember about the case she had no fever at the time; she may have had some discharge that was attended with blood. She did not complain of hernia that I heard of.

Dr. S. A. Collum, for defendant, testified:

I am a physician and surgeon; have been in the practice for 6 years or a little over. I knew Mrs. Emma Humble in January or February of this year, and had occasion to call on her, it was in February. I was called to see her in the case of obstetrics. She had a miscarriage, and was very low at the time, and was critically ill for 2 or 3 days. Dr. Abell was the attending physician and I assisted him in the case. I do not remember I do not know how many visits I made with him, but I think 2 or 3. Then she began to improve. I did not know her before that time. I have not seen her since until today, that I know of.

Q. There has been some evidence here that she has inguinal hernia, produced as some evidence tends to show, by falling into a seat the bottom of which gave way causing her to slip through the

seat, the frame of the seat remaining, which brought her thighs against the abdomen: would that tend to protect the parts there against hernia?

A. I do not know. I believe it would have a tendency to prevent it.

Cross-examination:

I believe that because the contraction of the muscles there where the hernia comes out, and the legs coming up against it would close up the opening. That would depend upon the position in which her limbs were as to whether they would protect that part of her abdomen. It seems to me that opening the limbs like that would protect the opening and prevent hernia. Supposing she fell on her arm or in an uneven manner, it might have a tendency to produce hernia. I would not say that it would not.

Mrs. SALLIE GARDNER, for defendant, testified:

I live on Rose hill in Texarkana. I know Mrs. Emma Humble; was acquainted with her last spring and winter for a while. I was acquainted with her before she went to Mrs. Skipwith's, but had never met her. During the time she was there I met her and had a conversation with her. She had bad health while she was at Mrs. Skipwith's. She told me herself that she used morphine for female weakness. She stated to me that she had flooding spells. She said she had had them ever since her baby boy was born, he was 4 or 5 years old then. She said she had these spells ever since he was born. She said she took morphine when she felt these flooding spells coming on. She never sent to me for morphine, but her little boy has come for my boy to go with him after morphine. She never said anything to me about her ability to labor or work. She often spoke to me of the condition of her health.

Mrs. NEELY WEARER, for defendant, testified:

I know the plaintiff; don't know exactly how I have known her. I remember when she had a spell of sickness at Mrs. Skipwith's. I became acquainted with her a little before that. She was in bad health after that sickness. I have talked with her about whether she used morphine; she said she had to use it ever since that baby boy was born, that she had flooding spells and had to use it. The boy was (*the*) 4 or 5 years old.

Thereupon the plaintiff, in rebuttal, introduced the following testimony:

WILLIS ABLES, for plaintiff in rebuttal testified:

I was about 10 or 12 feet from Mrs. Humble when she was helped out of the seat. I do not know that I heard her make any statement about being worse frightened than hurt.

Cross-examination:

I don't know that I heard her say anything; I asked her if she was hurt and she didn't make any answer.

Miss OCTAVIA HUMBLE, for plaintiff, testified:

I am the daughter of Mrs. Humble. At the time my mother was in the chair I was in the first seat and she was in the last one of that row. I did not hear her say after she was helped out that she was worse frightened that hurt.

Mrs. EMMA HUMBLE recalled testified:

When I was helped out of that position in the chair I did not make the statement that I was worse frightened than hurt.

Cross-examined:

I never saw McConnell before. No one asked me if I was hurt or not. He asked me just after I got back from the outside of the depot. The gentleman who assisted me out of the seat did not ask me (*me*) if I was hurt; he never spoke to me at all.

Defendants made the facts stated in their motion for a (*continuance*) as Mrs. Skipwith's testimony as follows:

That the plaintiff Mrs. Humble is a confirmed morphine
36 eater and highly excitable and was subject to severe spells of sickness and fainting while at her house; and that Mrs. Humble lived at (*at*) her house just before she claims to have been injured. That she had a miscarriage while there, a short while before April 9th, 1898, and came very near dying and was much weaker afterward than before.

The above evidence is all the evidence introduced in the trial of said cause. The defendant objects to all evidence going to show the plaintiff's capacity to labor was diminished by the injury, and the court overruled the objection, and the defendant then excepted. At the close of the evidence the defendant requested the court to charge the jury as shown in the following seven special instructions. And the court refused to give each and every one of said special instructions, and the defendant then and there excepted to the court's action in refusing each one of said instructions.

Charge 1.

In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby to receive the injuries she did. The court refused this charge, and the defendant then and there excepted.

Charge No. 2.

The plaintiff cannot recover any damages because of her capacity to labor being lessened. Because she has not proved her ability to

(*to*) labor was of any value at and before the time she was injured. The court refused this and defendant then and there excepted.

Charge No. 3.

The plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor or earn money at and just before she was injured. The court refused this charge, and defendant then and there excepted.

Charge No. 4.

In this case the plaintiff being a married woman and her husband not joining in the suit. She cannot recover any damages on account of her diminished capacity to labor and earn money. The court refused this charge, and the (*court*) then and there excepted.

Charge No. 5.

If you believe the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that
37 its condition was apparent to any person about to sit down in it, and you further believe that some boys, not in the employ of defendant, and without defendant's knowledge or consent, went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition; and this was done for the (—) deceiving persons and making them believe the seat was in good condition, and the plaintiff was deceived by its then appearance and induced to sit in the seat by reason of being thus deceived "then the defendant would not be liable."

The court refused this charge and defendant then and there excepted.

Charge 6.

The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having her present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in future has been lessened by the injury, and by the law of that State she cannot recover such damages.

"You, will, therefore, allow nothing as damages for any diminished capacity to labor and earn money."

The court refused the charge, and defendant then and there excepted.

Charge 7.

"Plaintiff cannot recover anything on account of her diminished capacity to labor."

"Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation.

"And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

The court refused this charge, and defendant then and there excepted.

Thereupon the court charged the jury as follows:

"Gentlemen, the complaint and answer in this case will be turned over to you so that you can take them to your room and read both, if you desire."

The instructions of the court are as follows:

The plaintiff in this case, in her complaint, sets forth the allegations of fact constituting her cause of action, and on the truth of which she relies for her recovery. Our statute requires that the defendant shall specifically deny such allegations in the complaint as it desires to put in issue.

In this particular case, the defendant, in its answer, does not deny anything contained in the complaint, except the allegation
38 that Emma Humble received any injuries to her person by reason of one of the seats in said waiting-room breaking with her. Under our system of pleading, all the material allegations in the complaint, except those allegations which are specifically denied in the answer, are taken as true; that is to say, it is not necessary, upon the part of the plaintiff, to introduce any proof to establish any material allegation contained in the complaint which is not specifically denied in the answer. By "material allegation," in this regard, you will understand that the allegation of damages is not one that you take as confessed or admitted; that must always be proven. The answer, therefore, raises but one issue, namely, whether or not Emma Humble received any injuries to her person by reason of the acts complained of in the complaint.

It was the duty of the defendant to keep the seats in its waiting-room in reasonably safe condition for the use of passengers who came to the depot for the purpose of taking the train. You will, therefore, inquire, in the first place, whether the said Emma Humble received any injuries to her person by reason of the acts complained of by her in her complaint. If she was injured then you will inquire whether said seat was in reasonably safe condition when she sat down upon it, and if you find it was not in a reasonably safe condition when she sat down upon it, then you will inquire whether the leaving of the seat in the condition you find the testimony shows that it was, was an act of negligence on the part of the defendant company, and was such an act of negligence as that some injury might have been foreseen or reasonably anticipated as the probable result of such an act of negligence; and if you find all of the foregoing facts in the affirmative, then your verdict should be for the plaintiff, and you should assess her damages in such sum as will compensate her (—) the injury which she has received.

There is nothing in the evidence to show that the act of leaving the seat in the condition in which it was when the plaintiff sat down upon it was malicious, upon the part of the company, and, therefore, plaintiff cannot recover any punitive damages, that is,

damages in the nature of punishment for the negligent act, by which I mean she could not recover any damages in excess of such damages as would compensate her for such injuries as you may find that she received, neither can she recover damages because when she had fallen through the seat, persons in the room, who witnessed the fall, laughed at her, whereby she was greatly mortified. In other words she is not permitted to recover any damages except such as will compensate her for the injury which she may have received from the fall.

39 If you should find for the plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof, her physical condition before the injury, and her physical condition after the injury, and the nature and character of the injury she received, whether it be permanent or temporary in its nature, and find for her such sum as will fairly and reasonably compensate her therefor, including therein fair and reasonable compensation for any physical and personal pain and suffering she may have undergone as the result thereof.

On the other hand, if you should find that the said Emma Humble received no injuries because of the acts complained of in her complaint, or if you find that the seat in which she sat down in the defendant's waiting-room was in a reasonably safe condition, or if you find that the seat was not in a reasonably safe condition, but that the leaving of it in the condition in which it was, was not such an act of negligence on the part of the defendant company as that any injury might have been foreseen or reasonably anticipated as the probable result of such an act of negligence, then your verdict should be for the defendant.

Mr. F. H. PENDERGAST (of counsel for defendant): You understand we except to the refusal of the written instructions?

The COURT: Yes.

Mr. F. H. PENDERGAST (of counsel for defendant): I want to make them a part of the record. And wherever your honor's charge is inconsistent with the written instructions I have asked, I except to it. I do not believe it is necessary, but, just on the moment, I desire to call your honor's attention to the fact—if there should be. I did not catch any as you read them, and I don't believe there are.

The COURT: I think when you ask yours and the court refuses them, and refuses to give anything covering the aspect that they present that that is sufficient, it raises your point, but if there is any specific exceptions to the charge of the court, I desire to have it pointed out, because there might be some verbal expression.

Mr. F. H. PENDERGAST (of counsel for defendant): There is nothing of that sort.

The defendant excepted to the following portion of the charge, at the time it was given: "If you should find for plaintiff in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received as shown by the proofs," because it allows plaintiff who is a married woman to recover damages on account of her capacity to labor and earn money,

being diminished when her husband J. K. Humble is not a
40 party and said injuries cannot be recovered by the wife, and because it appeared that at the time of the injury the plaintiff and her husband had made the State of Louisiana their home for the future.

The defendant also excepted to whatever in the charge is in conflict with the special instructions requested by the defendant.

The jury returned a verdict for plaintiff for $9,000, on which the court rendered judgment.

The court asked defendant's counsel what further proceedings he desired and defendant's counsel stated that he desired to make a motion for a new trial on the ground that the verdict was excessive.

The court stated that he usually did not (*usually*) disturb the verdict of a jury on account of the amount of damages found, unless it appeared in some way that (*the*) they had been influenced in returning it by passion or prejudice, which did not appear in this case.

Defendant'- counsel stated he desired to sue out a writ of error, thereupon the court stated he would allow until Jan. 15, '99, to have bill of exceptions prepared and settled, and ordered the cause kept open and execution stayed until Jan. 15, 1899.

Defendant presents this its bill of exceptions and prays same be allowed, signed and made a part of the record in this case, which is accordingly ordered.

JNO. H. ROGERS,
United States District Judge for Western District of Arkansas.

Indorsed: No. 151. Emma Humble *vs.* Tex. & Pac. R'y Co. Bill of exceptions. Filed in my office Jan'y 2d, 1899. Sam. Gibson, clerk.

Bond on Writ of Error.

Know all men by these presents, that we, The Texas & Pacific Railway Company and The Fidelity & Deposit Company, are firmly held and bound (—) Emma Humble in the full and just sum of twelve thousand dollars to be paid to the said Emma Humble, her heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 22d day of Dec., in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at the November term, A. D. 1898, of the circuit court of the United States for the western district of Arkan-
41 sas, Texarkana division, in a suit depending in said court between Emma Humble, plaintiff, and The Texas & Pacific Railway Company, defendant, a judgment was rendered against the (*the*) said The Texas & Pacific Railway Company for nine thousand dollars ($9,000.00) on November 26, A. D. 1898, and the said The Texas & Pacific Railway Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and citation directed to the said Emma Humble, citing and admonishing

her to be and appear in the United States circuit court of appeals for eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation. Now the condition of the above obligation is such that if the said The Texas & Pacific Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN, *Its Gen'l Att'y.* [SEAL].
FIDELITY & DEPOSIT CO. OF MARYLAND,

[Seal of F. & D. Co.]

By OSCAR DAVIS, *Att'y-in-fact.*

Attest: J. E. COATS, *Gen'l Agent.*

Sealed and delivered in the presence of—

—— ——.

Approved:
JNO. H. ROGERS, *Judge.*

Indorsed: No. 151. Emma Humble *vs.* The Texas & Pacific R'y Co. Bond on writ of error. Filed 2nd day of January, 1899. Sam. Gibson, clerk.

Assignment of Errors.

In the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

EMMA HUMBLE
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } 151.

Now comes the Texas & Pacific Railway Company and shows to the court that in the proceedings and in the judgment rendered in the above cause on the 26th day of November, A. D. 1898, manifest error hath happened to the damage of the said Texas & Pacific Railway Company, as follows:

First.

The court erred in overruling the motion made by the defendant before the trial began, to compel plaintiff, a married woman, to make her husband, J. K. Humble, a party plaintiff, so that
42 all matters and the rights of both plaintiff and her husband could be tried at once.

Second.

The court erred in overruling the motion made by defendant to continue the cause for the want of the testimony of Mrs. Virginia Skipwith, because it was shown to the court on said application that.

her evidence was material to defendant's defense, and that she had been regularly subpœnaed and was sick and unable to attend and she lived within a mile of where the case (—) being tried, and the admission of plaintiff that the witness would swear as alleged was no answer to the motion.

Third.

The court erred in allowing the following evidence to go to the jury. Mrs. Humble testified: "My means of livelihood for the last few years has been the keeping of a hotel, this was last year, just before I came to Texarkana. It was run by me as my sole and separate business. I superintended the work and worked when we were short of help." Drs. Gray and Ford testified that Mrs. Humble's capacity to labor was diminished one-third or more.

This evidence was not admissible, because the plaintiff was a married woman and the recovery for those damages belonged to her husband and could not be recovered by the wife suing alone.

Fourth.

The court erred in refusing special charge No. 1 requested by defendant, as follows: "In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys for whose acts the defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby she received the injury she did."

Fifth.

The court erred in refusing special charge No. 2, requested by defendant, as follows:

The plaintiff cannot recover any damages because of her capacity to labor being lessened, because she has not proved her ability to labor was of any value at and before the time she was injured.

Sixth.

The court erred in refusing special charge requested by the defendant, as follows:

Plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because
43 there is no evidence showing any capacity to labor and earn money at (—) and just before she was injured.

Seventh.

The court erred in refusing special charge No. 4, requested by the defendant, as follows:

In this case the plaintiff being a married woman, and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money.

Eighth.

The court erred in refusing special charge No. 5, requested by defendant as follows:

"If you believe that the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down in it, and you further believe that some boys, not in the employ of the defendant, and without defendant's knowledge or consent, went, a short time before the accident, and fixed the perforated bottom into the frame of the seat, so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition, and the plaintiff was deceived by its then appearance and induced to sit in the seat by reason of being thus deceived, then defendant would not be liable."

Ninth.

The court erred in refusing special charge No. 6, requested by the defendant, as follows:

The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having their present and prospective home in the State of Louisiana. Then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in the future has been lessened by the injury, and by the laws of that State she cannot recover such damages. You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money.

Tenth.

The court erred in refusing special charge No. 7, requested by defendant, as follows:

Plaintiff cannot recover anything on account of her diminished capacity to labor. Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation. And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery.

44 Eleventh.

The court erred in charging the jury as follows:

"If you should find for plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof."

This was error, because it allows the plaintiff, who is a married woman, to recover damages on account of her capacity to labor and earn money being diminished when her husband, J. K. Humble, is not a party, and said (*injuries*) cannot be recovered by the wife, and because it appeared at the time of the injury and at the time of the trial the plaintiff and her husband had made the State of Louisiana their home for the future, and in that State the husband, and not the wife, can recover the damages by reason of the wife's diminished capacity to labor and earn money.

Wherefore, the Texas & Pacific Railway Co. prays for a writ of error to remove said cause to the United States circuit court of appeals, that said judgment and proceedings may be revised and said errors corrected.

And it prays that the judgment rendered in the circuit court may be reversed.

F. H. PRENDERGAST,
Att'y for Texas & Pacific Railway Co., Plaintiff in Error.

Writ of error allowed and supersedeas bond fixed at $12,000.00 this January 2d, '99.

JNO. H. ROGERS, *Judge.*

Indorsed: No. 151. Emma Humble *vs.* The Texas & Pacific R'y Co. Assignment of errors. Filed in my office this 2d day of January, A. D. 1899. Sam. Gibson, clerk of the circuit court.

Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Arkansas, Texarkana division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1898, thereof, between Emma Humble, plaintiff, and The Texas & Pacific Railway Company, defendant, wherein a judgment was rendered for the plaintiff against the defendant on the 26th day of November, A. D. 1898, for the sum of nine thousand dollars, a manifest error hath happened to the great damage of the said The Texas & Pacific Railway Company,
45 as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 1st day of March, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

The Seal of the Circuit Court, Eastern Dist. Ark., U. S. A., Texarkana Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of January, in the year of our Lord one thousand eight hundred and

ninety-nine. Issued at office in the city of Texarkana with the seal of the circuit court of the United States for the western district of Arkansas, Texarkana division, dated as aforesaid.

SAM. GIBSON,
Clerk Circuit Court United States, West. District of Ark., Texarkana Division.

Allowed by—
JOHN H. ROGERS, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Western District of Arkansas, Texarkana Division, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said court, at office in the city of Texarkana, this 26th day of January, A. D. 1899.

SAM. GIBSON,
Clerk of said Court.

46 I certify that a copy of this writ of error was filed in my office for Emma Humble, defendant in error, on the — day of January, A. D. 1899.

OSCAR D. SCOTT AND
PAUL JONES.

No. 151. United States circuit court, western district of Arkansas, Texarkana division. The Texas & Pac. R'y Co. *vs.* Emma Humble. Writ of error to the circuit court of the United States for the western district of Arkansas, Texarkana division. Filed 2d day of Jan'y, 1899. Sam. Gibson, clerk.

Original.

The United States of America to Emma Humble and her attorneys, O. D. Scott and Paul Jones, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, Texarkana division, wherein the Texas & Pacific Railway Company, against whom a judgment in your favor for nine thousand dollars was rendered on November 26th, A. D. 1898, in cause No. 151 on the docket, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error

mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Rogers, judge of the circuit court of the United States for the western district of Arkansas, this 2nd day of January in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN H. ROGERS,
Judge of the District Court of the United States for the Western District of Arkansas.

We accept service of the within citation on writ of error.

OSCAR D. SCOTT AND
PAUL JONES,
Att'ys for Emma Humble, Defendant in Error.

January 25th, A. D. 1899.

No. 151. United States circuit court, western district of Arkansas, Texarkana division. The Texas & Pacific Railway Company *vs.* Emma Humble. Citation on writ of error. Filed 2nd day of January, 1899. Sam. Gibson, clerk.

UNITED STATES OF AMERICA:

I, Sam. Gibson, clerk of the circuit court of the United States in and for the Texarkana division of the western district of
47 Arkansas, do hereby certify that the annexed and foregoing writing, on pages numbered from 1 to 93 inclusive, contains a true, correct and compared transcript of all the records, papers and proceedings in the case of Emma Humble *vs.* The Texas & Pacific Railway Co., No. 151.

The Seal of the Circuit Court, East Dist. Ark., Texarkana Division, U. S. A.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Texarkana, Arkansas, this 26th day of January, A. D. 1899.

SAM. GIBSON, *Clerk.*

(Cancelled 10c. U. S. rev. stamp.)

Filed Feb. 24, 1899.

JOHN D. JORDAN, *Clerk.*

48 *Appearance for Plaintiff in Error.*

And on the twenty-fourth day of February, A. D. 1899, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE, Defendant in Error. } No. 1223.

The clerk will enter my appearance as counsel for The Texas & Pac. R'y Co., plaintiff in error.

F. H. PRENDERGAST,
Marshall, Texas.
T. J. FREEMAN,
Dallas, Texas.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1223. Texas & Pacific R'y Co., plaintiff in error, *vs.* Emma Humble. Appearance. Filed Feb. 24, 1899. John D. Jordan, clerk. F. H. Prendergast, Marshall, Tex.; T. J. Freeman, gen. att'y, Dallas, Tex., counsel for plaintiff in error.

Appearance for Defendant in Error.

And on the twenty-fourth day of February, A. D. 1899, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE. } No. 1223.

The clerk will enter my appearance as counsel for the defendant in error.

OSCAR D. SCOTT.
PAUL JONES.

49 (Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1223. Texas and Pacific Railway Company, plaintiff in error, *vs.* Emma Humble. Appearance. Filed Feb. 24, 1899. John D. Jordan, clerk. Oscar D. Scott, Paul Jones, counsel for def't in error.

Order of Submission.

And on the thirty-first day of May, A. D. 1899, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

WEDNESDAY, *May* 31, 1899.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE. } No. 1223.

In error to the circuit court of the United States for the western district of Arkansas.

This cause having been called for hearing, argument was commenced by Mr. F. H. Prendergast, for plaintiff in error, continued by Mr. Oscar D. Scott, for defendant in error, and concluded by Mr. F. H. Prendergast, for plaintiff in error.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

Opinion.

And on the sixth day of November, A. D. 1899, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

50 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1899.

THE TEXAS AND PACIFIC RAILWAY Company, Plaintiff in Error,
vs.
EMMA HUMBLE, Defendant in Error. } No. 1223. In Error to the Circuit Court of the United States for the Western District of Arkansas.

Mr. F. H. Prendergast (Mr. T. J. Freeman was with him on the brief) for the plaintiff in error.

Mr. Oscar D. Scott (Mr. Paul Jones and Mr. S. S. Solinsky were with him on the brief) for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Emma Humble, the defendant in error, brought this action against The Texas and Pacific Railway Company, the plaintiff in error, to recover compensation for certain personal injuries which she sustained in the defendant's waiting-room or station at Texarkana, Arkansas, on April 9, 1898, while she was waiting to become a passenger on one of the defendant's trains. She attempted to take a seat in said waiting-room in one of the chairs that had been provided for the use of passengers, but owing to a defect in the chair the bottom gave way, causing her to fall through the chair and to become wedged therein until she was extricated. As a result of the accident the plaintiff sustained serious internal injuries, which, as she claimed, and as the evidence tended to show, had permanently

impaired her health and strength and lessened her capacity to labor, besides compelling her to wear a truss to counteract the effects of a rupture. A judgment was recovered by the plaintiff in the lower court which has been brought before this court for review on a writ of error.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

At the commencement of the trial in the lower court the defendant company asked that court to require the plaintiff's husband to be made a party plaintiff, assigning as a reason for such motion that if the plaintiff could recover for the injuries complained of, then her husband could also recover, and that it was desirable that he should be joined to the end that all claims might be settled in one suit. The motion was denied and an exception was saved. We perceive no merit whatever in this exception, as the suit was by the wife to recover for certain personal injuries which she had sustained, and as the laws of Arkansas, where the suit was brought, expressly provide (Sandel's & Hill's Digest of the Statutes of Arkansas, section 5641) that a married woman "may maintain an action in her own name * * * for any injury to her person, character or property." This statute is applicable to suits commenced in the Federal courts as well as to suits brought in the courts of the State. Morning Journal Association *v.* Smith, 1 U. S. App., 270, 275; 56 Fed. Rep., 141. Besides, as this action was originally instituted in a State court and was removed therefrom to the Federal court at the instance of the defendant, it could not by such removal deprive the plaintiff of the right secured to her by local laws to prosecute the suit in her own name for her own benefit. Revised Statutes of the United States, section 721.

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When the case was called for trial the defendant company, in addition to the above motion, also applied for a continuance, but as the plaintiff's attorney took advantage of the provisions of the Arkansas statute (Sandel's & Hill's Digest of the Laws of Arkansas, sec. 5797) and admitted that the absent witness, if present, would testify to the facts stated in the defendant's application for a continuance the motion was overruled. There was no error in such action. The trial court properly exercised its discretionary power. Besides, error cannot be assigned on appeal or writ of error on account of such discretionary action by the trial judge, as this court and other Federal courts have repeatedly decided. Davis *v.* Patrick, 12 U. S. App., 629, 635, 57 Fed. Rep., 909, and cases there cited.

Complaint is next made of the refusal of the trial court to give two instructions which were asked by the defendant. These instructions were as follows:

"1. In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby to receive the injuries she did."

"5. If you believe the seat in question was out of order by reason

of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down on it, and you further believe that some boys, not in the employ of defendant, and without defendant's knowledge or consent, went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition; and this was done for the (— —) deceiving persons and making them believe the seat was in good condition, and the plaintiff was deceived by its then appearance and induced to sit in the seat by reason of being thus deceived then the defendant would not be liable."

The first of these instructions was properly denied because it assumed that an act committed by some mischievous boys was
52 the proximate cause of the injury, without submitting that issue to the arbitrament of the jury. The only evidence contained in the record which tended to afford a basis for the foregoing instructions was the testimony of one witness to the effect that the chair in question had been out of repair for some time and that certain small boys on some previous occasions had fixed the seat so as to make it appear all right and then induced their unwary playmates to sit down in it and receive a fall. There was no evidence, so far as we are able to discover, which would have warranted the court in instructing the jury as a matter of law, as it was asked to do in the first of the above instructions, that the fall of which the plaintiff complained was induced by the malicious act of a stranger rather than by the neglect of the defendant company. There was abundant evidence to the effect that the chair had been out of repair in the waiting-room for a long time; that it was in such a condition as to prove a trap for the unwary and that the station master had been notified of its condition and had taken no steps to remove it or to have it repaired. In view of this testimony it is manifest that the first instruction should not have been given.

The other instruction was also erroneous, in that it assumed that there was some evidence before the jury tending to show that the bottom of the chair was out or hanging down and that the defect therein was obvious to every one when the plaintiff attempted to sit down. We find no evidence to that effect, but on the contrary, we do find testimony which tended to show that it appeared to be in a suitable condition at the time of the accident. Besides, the instruction utterly ignored an obligation which rested on the defendant company either to remove the chair from its waiting-room or cause it to be repaired when it had notice of the defect therein and the tricks which boys were in the habit of playing on each other. It was the province of the jury to decide whether the defendant was not guilty of some negligence directly contributing to the injury which the plaintiff sustained, in permitting the chair to remain for a long time in its waiting-room with knowledge of its condition and the use that was being made of it by boys to deceive unsuspecting persons. In view of the testimony in the case and the form of the instruction it was clearly erroneous and properly refused.

The next and most important question in the case is whether the trial court erred in instructing the jury that if the finding was for

the plaintiff they might, in assessing the plaintiff's damages, "take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs." This direction is said to have been wrong because the plaintiff was thereby allowed to recover for a loss of her earning capacity, which was an injury, as it is claimed, on account of which the husband alone is entitled to demand compensation. It is further said that the husband was especially entitled to recover for the loss of the wife's earning capacity in the case at bar because he had taken up his abode in the State of Louisiana, shortly prior to the accident, under whose laws a claim for damages for an injury to the wife is community property which must be sued for by the husband and the wife.

The plaintiff in the case at bar, as the evidence shows, had resided in the State of Arkansas, where she was hurt, for more than
53 ten years prior to the injury, but she was on her way to Shreveport, Louisiana, to join her husband when the injury was sustained. Now, assuming it to be true, although the fact was not pleaded, that the plaintiff's husband had taken up his abode in the State of Louisiana shortly before the accident, and that the laws of that State make the damages claimed community property and entitle the husband to join in a suit for their recovery in that State—the inquiry arises whether by virtue of these facts the plaintiff's rights when she sued in the State of Arkansas for an injury there sustained differed in any respect from those of a married woman domiciled in that State. We think that this question should be answered in the negative. The laws of Louisiana cannot be allowed to have any extraterritorial effect in a case of this character. It was competent for the legislature of the State of Arkansas to determine, as it has done, by whom a suit may be brought for personal injuries sustained by a married woman and the legislative direction on that subject must be observed in all suits which are commenced in that State. It was equally competent for the legislature to enlarge the rights of married women so as to work a change in the kind and amount of damages recoverable by them on account of personal injuries sustained within the State, and such laws, if enacted, necessarily inured to the benefit of every married woman who subsequently sued in the courts of the State for personal injuries there sustained. It sometimes happens that the measure of damages for the same wrong is not the same in one jurisdiction as in another; but it has never been supposed that the courts of one State, when appealed to for relief by a non-resident, are bound to apply the rule for the admeasurement of damages which prevails in the non-resident's place of abode if it differs from their own. It is clear that the rule in vogue in another jurisdiction ought not to be applied when, as in the case at bar, the tort was committed not in the foreign jurisdiction but within the State whose courts are asked to afford redress for the alleged wrong. In short, the laws of a State, whether statutory or the result of judicial decision thereon, should have a uniform operation throughout the State, whether the protection thereof is sought by a citizen or a stranger, and this principle should be enforced especially in actions to obtain redress for an in-

jury to the person, character or reputation of the plaintiff committed within the State. The same damages should be awarded for the wrong whether the action is by a citizen of the State or a non-resident, since by appealing for relief in an action that is transitory and may be brought anywhere, the plaintiff necessarily elects to take that measure of relief which the chosen forum affords to its own citizens and becomes subject alike to the advantages and disadvantages which ensue from his choice of a forum.

It results from what has been said that the substantial question in the case is whether under the laws of Arkansas a married woman, when suing for a personal injury there sustained, is entitled to recover as a part of her damages for a loss of earning capacity incident to the injury. The statutes of that State provide, as heretofore shown, that she may maintain a suit in her own name for an injury to her person, character or property. They further provide in substance (Sandel's & Hill's Digest of the Statutes of Arkansas, secs. 4940 and 4945)

that both the personal and real property of the wife, acquired
54 either before or after her marriage, shall be and remain her separate estate and property and may be disposed of as if she

were a *femme sole;* they also declare that property of all kinds which comes to a married woman by gift, bequest, or descent, and that which she acquires by her trade, business, labor, or services carried on or performed on her sole or separate account, and the rents, issues, and proceeds of all such property shall remain her own and may be used, invested, and disposed of by her as she deems best, free from the control of her husband and without liability for his debts. Herein is found a clear authority by inference for a married woman to engage in trade or in any business which she may elect to pursue, the same as a *femme sole*, and to hold whatever property she may thus acquire as her own, free from the control or interference of her husband. The question does not appear to have been decided by the local courts whether in view of the aforesaid statute a married woman suing for a personal injury in the State of Arkansas may lay claim to compensation for a loss of earning capacity, but it seems to us to follow logically from the authority given her to carry on any business as a *femme sole* and to appropriate the proceeds of her labor that a loss of earning capacity incident to a personal injury is a loss for which a married woman is entitled to demand reasonable compensation from the wrong-doer. As she is entitled to enjoy the benefits of her own labor without participation by the husband, a wrongful or negligent act which lessens her capacity to labor inflicts a loss on account of which she should be entitled to recover as well as for the pain and suffering which was occasioned by the injury. The precise question here involved has recently undergone judicial consideration in the State of Massachusetts, whose laws concerning the rights of married women are substantially the same as in the State of Arkansas. Harmon *v.* Old Colony Railroad, 165 Mass., 100, 104. It was there held in substance that the right conferred on married women by the statutes of that State to engage in trade and business on their own account and to enjoy the fruits of their own labor, is inconsistent with the theory

that a married woman's capacity to labor belongs exclusively to her husband, and as a corollary from that proposition it was decided that in an action by a wife for personal injuries the jury were entitled to consider to what extent, if any, the injury sustained had impaired her capacity to labor. The supreme court of Montana appears to have adopted a similar view in Hamilton *v.* Great Falls Street R'y Co., 17 Mont., 334. See also Jordan *v.* Middlesex R'y Co., 138 Mass., 425. Moreover, in the case at bar there was evidence which showed that before the plaintiff was injured she had been engaged for several years in running a hotel and boarding-house, which occupation was pursued as her sole and separate business. There was further testimony to the effect that she had discontinued the business aforesaid shortly prior to the accident owing to a temporary illness and had not been engaged in any business since then owing to her enfeebled condition, which had incapacitated her from doing any work except such as could be done while she was sitting down. In view of what has been said, we are of opinion that no error was committed by the trial judge in permitting the jury to consider the plaintiff's earning capacity before and after the accident for the purpose of arriving at a just assessment of the damages. She
55 was entitled to some allowance on this account if the proof showed that her capacity to labor had been impaired by the injuries which she received, since it cannot be maintained under such laws as prevail in the State of Arkansas that a wife's capacity to labor is the exclusive property of her husband. It is certain that no such doctrine ought to be tolerated in a case where it appears that previous to the injury the wife had carried on business in her own name and for her own benefit. Finding no error in the record, the judgment below is hereby affirmed.

SANBORN, circuit judge, dissenting:

The question presented in this case has been the subject of much discussion and of conflicting decisions, but under the statutes of Arkansas the logical result seems to me to be that the husband may and the wife cannot recover for the loss of the wife's services or for her diminished capacity to labor, which is the same thing. The husband is still the head of the family in Arkansas. He is liable for the support of the family and lawfully entitled to services from his wife in that regard and he necessarily loses through the impairment of her capacity to labor. The authorities cited in the majority opinion seem to rest on a supposed distinction between loss of service and diminution of the capacity to labor and to hold that the husband may recover for the former and the wife for the latter (Hamilton *v.* Great Falls R'y Co., 17 Mont., 334; Harmon *v.* Old Colony R. R. Co., 42 N. E., 505; Jordan *v.* Middlesex, 138 Mass., 425), but there is and can be no practical distinction between them. The loss of service is the measure of the impairment of capacity and the proof of it, and to permit the husband to recover for the loss of service and the wife for impairment of capacity to render it is to allow two recoveries for the same damages. We have already held that under the Arkansas statutes the husband may recover for the destruction

of the wife's capacity to labor and the loss of her service resulting therefrom. St. Louis and S. W. R'y Co. *v.* Henson, 58 Fed., 531, 533. To my mind, this was to hold that the wife could not recover for them and I think that this is the true rule and that it is in accord with the weight of authority. Union St. R'y Co. *v.* Stone, 37 Pac., 1015; Blaenchinska *v.* Howard Mission, 29 N. E., 755; Filer *v.* R. R. Co., 49 N. Y., 47; Tuttle *v.* C., R. I. and P. R. R. Co., 42 Iowa, 518, 521.

My conclusion is that her earning capacity was not a proper element of the damages of the married woman in this case and that the judgment ought to be reversed for that reason.

Filed November 6, 1899.

56 *Judgment.*

And on the sixth day of November, A. D. 1899, in the record of proceedings of the said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

NOVEMBER 6, 1899.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE.
} No. 1223.

In error to the circuit court of the United States for the western district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Arkansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Emma Humble have and recover against the Texas and Pacific Railway Company the sum of twenty dollars for her costs herein and have execution therefor.

Application for Writ of Error and Assignments of Error.

And on the fifteenth day of December, A. D. 1899, there was filed in the clerk's office of said circuit court of appeals an application for writ of error and assignments of error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE, Defendant in Error. } No. 1223.

To the Honorable Melville W. Fuller, Chief Justice, or to any associate justice, of the Supreme Court of the United States:

57 Now comes The Texas and Pacific Railway Company, by its attorney, and complains that in the record and proceedings and also in the rendition of the judgment of the United States circuit court of appeals for the eight-circuit in the above styled and numbered cause on the sixth day of November, 1899, affirming the judgment of the United States circuit court for the western district of Arkansas in said cause, manifest error hath intervened, to the great damage of the Texas and Pacific Railway Company; that the jurisdiction of the circuit court for the western district of Arkansas in this cause depended upon the fact that The Texas and Pacific Railway Company, defendant therein, was a corporation created by an act of Congress; that the amount involved herein and the matter in controversy exceeds the sum of one thousand dollars besides costs, and this is not a case in which the jurisdiction of the circuit court of appeals is made final, and The Texas and Pacific Railway Company, plaintiff in error, hereto attaches and makes a part of this application its assignments of error.

Whereof it prays for allowance of writ of error, to the end that this cause and said judgment may be carried to the Supreme Court of the United States, and it prays for supersedeas of said judgment and such other process as may cause the same to be corrected by the said Supreme Court.

T. J. FREEMAN,
Attorney for the Texas and Pacific Railway Company.

Writ of error and supersedeas allowed and bond fixed at the sum of $15,000 this the 7th day of December, 1899.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

58 United States Circuit Court of Appeals, Eighth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMMA HUMBLE, Defendant in Error. } No. 1223.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in overruling the motion made by plaintiff in error before the trial began to compel defendant in error, a married woman, to make her husband, J. K. Humble, a party plaintiff, so that all matters and the rights of both defendant in error and her husband could be tried at once.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in overruling the motion made by plaintiff in error to continue the cause for want of the testimony of Mrs. Virginia Skipwith, because it was shown to the court on said application that her evidence was mater-al to plaintiff in error's defense, and that she had been regularly subpœnaed and was sick and unable to attend, and she lived within a mile of where the case was being tried, and the admission of defendant in error that the witness would swear as alleged was no answer to the motion.

59 IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in allowing the following evidence to go to the jury. Mrs. Humble testified:

"My means of livelihood for the last few years has been the keeping of a hotel; this was last year, just before I came to Texarkana. It was run by me as my sole and separate business. I superintended the work and worked when we were short of help."

Drs. Gray and Ford testified that Mrs. Humble's capacity to labor was diminished one-third or more.

This evidence was not admissible, because the defendant in error was a married woman and a recovery for those damages belonged to her husband and could not be recovered by the wife suing alone.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts the defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby she received the injury she did."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff cannot recover any damages because of her capacity to labor being lessened, because she has not proved her
60 ability to labor was of any value at and before the time she was injured."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor and earn money at the time and just before she was injured."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff being a married woman, and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

IX

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"If you believe that the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down in it, and you further believe that some boys not in the employ of the defendant and without defendant's knowledge or consent went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition and the plaintiff was deceived
61 by its then appearance and induced to sit in the seat by reason of being thus deceived, then defendant would not be liable."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas

and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff being a married woman and her husband not having joined her in this suit and she and her husband having their present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in the future has been lessened by the injury, and by the laws of that State she cannot recover such damages. You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover anything on account of her diminished capacity to labor because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession, or occupation, and her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in charging the jury as follows:

"If you should find for plaintiff, in assessing her damages, you will take into consideration her age and earning capacity
62 before and after the injury was received, as shown by the proof."

This was error because it allows the defendant in error, who is a married woman, to recover damages on account of her capacity to labor and earn money being diminished, when her husband, J. K. Humble, is not a party, and said damages cannot be recovered by the wife, and because it appeared at the time of the injury and at the time of the trial the defendant in error and her husband had made the State of Louisiana their home for the future, and in that State the husband and not the wife can recover the damages by reason of the wife's diminished capacity to labor and earn money.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed; and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas and Pacific R'y Co.,
Plaintiff in Error.

Endorsed: No. 1223. The Texas & Pacific Railway Company, plaintiff in error, *vs.* Emma Humble, defendant in error. Application for writ of error and assignments of error. Filed December 15, 1899. John D. Jordan, clerk.

And on the fifteenth day of December, A. D. 1899, there was filed in the clerk's office of said circuit court of appeals, in said cause, a supersedeas bond in the words and figures following to wit:

Supersedeas Bond.

Know all men by these presents that we, The Texas and Pacific Railway Company, a corporation duly incorporated, as principal, and George J. Gould, of Lakewood, State of New Jersey, as surety, are held and firmly bound unto Emma Humble in the full and just sum of fifteen thousand dollars ($15,000), to be paid to the said Emma Humble, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

63 Sealed with our seals and dated this the 6th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a regular term of the United States circuit court in and for the western district of Arkansas, sitting at Texarkana, at the November term, 1898, in a suit pending in said court between Emma Humble, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said The Texas and Pacific Railway Company for the sum of nine thousand dollars ($9,000), besides costs of suit; and

Whereas from said judgment the said The Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the eighth circuit, which court, on the 6th day of November, 1899, rendered a judgment affirming said judgment in all particulars; and

Whereas the said The Texas and Pacific Railway Company has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to the said Emma Humble, citing and admonishing her to be and appear at said Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEO. J. GOULD, *President.*
GEO. J. GOULD.

Witness:
C. E. SATTERLEE, *Sec'y.*

December 7th, '99.—The foregoing bond is approved to operate as a supersedeas.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

64 Endorsed: No. 1223. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Emma Humble, defendant in error. Supersedeas bond. Filed December 15, 1899. John D. Jordan, clerk.

Writ of Error.

And on the fifteenth day of December, A. D. 1899, there was filed in the clerk's office of said circuit court of appeals, in said cause, a writ of error, the original of which is hereto attached and herewith returned:

65 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Emma Humble, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1223. Texas and Pacific R'y Co., plaintiff in error, *vs.* Emma Humble. Writ of error. Filed Dec. 15, 1899. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this twenty-third day of December, A. D. 1899.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

66 *Citation.*

And on the fifteenth day of December, A. D. 1899, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the proof of service endorsed thereon, is hereto attached and herewith returned:

67 UNITED STATES OF AMERICA, *ss:*

To Emma Humble or her attorney or attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 7th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

On this 12th day of December, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared Geo. J. Armistead before me, the subscriber, and makes oath that he delivered a true copy of the within citation to O. D. Scott, of the firm of Scott & Jones, attorneys of record for Emma Humble.

GEO. J. ARMISTEAD.

Sworn to and subscribed the 12 day of December, A. D. 1899.

[Seal of Notary Public, County of Bowie, Texas.]

G. B. ELLIS,
Notary Public, Bowie Co., Tx.

[Endorsed:] No. 1223. Texas and Pacific R'y Co., plaintiff in error, *vs.* Emma Humble. Citation. Filed Dec. 15, 1899. John D. Jordan, clerk.

68 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing sixty-seven pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The Texas and Pacific Railway Company, plaintiff in error, *vs.* Emma Humble, No. 1223, May term, 1899, as fully as the same remain on file and of record in my office.

I do further certify that the original writ of error and the original citation, together with the proof of service endorsed thereon, are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Louis, Missouri, this twenty-third day of December, A. D. 1899.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Ten-cent U. S. internal revenue stamp, canceled Dec. 23, '99. J. D. J.]

Endorsed on cover: File No., 17,597. U. S. C. C. of appeals, 8th circuit. Term No., 177. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Emma Humble. Filed January 3, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. EMMA HUMBLE.	No. 177.

Statement.

This action for personal injuries was brought by Emma Humble against The Texas and Pacific Railway Company in May, 1898, in the Circuit Court of Miller County, Arkansas, and was removed to the Circuit Court of the United States for the proper district on the ground that the defendant is a corporation created and organized under the laws of the United States.

At the time the accident, which constitutes plaintiff's cause of action, occurred, and at all other times covered by the record, plaintiff was a married woman, the wife of one J. K. Humble. Her husband was not joined in the action.

In her complaint (Tr., p. 1) plaintiff alleged that on the 9th day of April, 1898, she went to defendant's

station in Texarkana, Miller County, Arkansas, for the purpose of taking a train to Shreveport, Louisiana; that after purchasing her ticket she went to the waiting room to await the arrival of the train and that she sat down on a seat furnished by defendant for the accomodation of waiting passengers; that the bottom of said seat fell through, allowing her body to slip in such a manner that her limbs and head protruded above it, and that in her struggles to release herself she sustained a rupture which is incurable; that said seat was defective and that the defendant knew of the defect; that there was nothing in the appearance of the seat to indicate that it was defective, and that she had no notice that it was defective. She also alleged, by way of damages, that she must always be "debarred from performing her household duties, such as lifting, or she must submit to a surgical operation which will be painful and dangerous," and "that she had been accustomed to do, and had done, all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one half." She prayed for $25,000 damages.

It will be observed, and we wish it especially noted, that the complaint does not allege, as we insist it should in order to state a cause of action, for loss of earning capacity, that the wife was at the time of the injury engaged in any business or service in which she would, but for the personal injury for which this action is brought, have earned something for her *separate benefit* which she has

lost by reason of the injury for which this action is brought. Such facts are essential to any right of the wife under the statute of Arkansas relied on by she plaintiff to support the action, in order to give the wife a right of action in her own name for damages for loss or diminution of earning capacity.

The defendant by its answer (Tr., p. 7) alleged that plaintiff "was at the time of the alleged injury, and is now, a married women," and denied that she "received any injuries to her person by reason of one of the seats in said waiting-room breaking with her."

Some days before the trial defendant made a motion (Tr., p. 9) that plaintiff be compelled to make her husband a party plaintiff on the ground that if she could recover for her injury her husband could also recover upon the same proof.

On the hearing of said motion, November 17, 1898, it was admitted that J. K. Humble was the husband of the plaintiff at the time she received the injury, and at the time of the hearing; and that he lived, and still lives, in Shreveport, Louisiana, as his home. The motion was overruled and defendant excepted (Tr., p. 9).

Plaintiff introduced evidence tending to prove the allegations of her complaint. She herself testified that for the past few years her means of livelihood had been keeping a boarding house and hotel at Pine Bluff, and that the business was run in her name and was her own (Tr., p. 12); that she left Pine Bluff, going to Texarkana, about October, 1897 (Tr., p. 14); that she gave up the hotel business three or four days, "or something like that," before she left Pine Bluff (Tr., p. 15); that in Texarkana she had been boarding at different places until the time of the accident (Tr., p. 14), and that while there she did not have any oc-

cupation, and she was not carrying on any trade or business on her own account at the time of the accident (Tr., pp. 14, 15). To this testimony, and that of other witnesses tending to prove plaintiff's capacity to earn money by her labor, defendant objected. The objections were overruled and exceptions taken (Tr., pp. 12, 32).

The defendant introduced evidence contradicting plaintiff's witnesses as to the condition of the seat and as to the injuries sustained by plaintiff.

There was a verdict in favor of the plaintiff for $9,000, and judgment for that sum and costs was duly entered. This judgment included damages for diminution of the wife's earning capacity extending throughout her life (see *infra*, pp. 30–32).

On writ of error to the United States Circuit Court of Appeals for the Eighth Circuit the judgment was affirmed by a majority of the court, SANBORN, J., dissenting (Tr., pp. 45 and 49).

The case is now here for review on writ of error from the judgment of affirmance.

Assignment of errors.

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas, and in holding that said court committed no error in overruling the motion made by plaintiff in error before the trial began to

compel defendant in error, a married woman, to make her husband, J. K. Humble, a party plaintiff, so that all matters and the rights of both defendant in error and her husband could be tried at once.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in overruling the motion made by plaintiff in error to continue the cause for want of the testimony of Mrs. Virginia Skipwith, because it was shown to the court on said application that her evidence was material to plaintiff in error's defense, and that she had been regularly subpœnaed and was sick and unable to attend, and she lived within a mile of where the case was being tried, and the admission of defendant in error that the witness would swear as alleged was no answer to the motion.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in allowing the following evidence to go the jury. Mrs. Humble testified:

"My means of livlihood for the last few years has been the keeping of a hotel; this was last year, just before I came to Texarkana. It was run by me as my sole and separate business. I superintended the work and worked when we were short of help."

Drs. Gray and Ford testified that Mrs. Humble's capacity to labor was diminished one-third or more.

This evidence was not admissible, because the defendant in error was a married woman and the recovery for those damages belonged to her husband and could not be recovered by the wife suing alone.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said

court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts the defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby she received the injury she did."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff cannot recover any damages because of her capacity to labor being lessened, because she has not proved her ability to labor was of any value at and before the time she was injured."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor and earn money at the time and just before she was injured."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing special charge asked by plaintiff in error which is as follows:

"In this case the plaintiff being a married woman, and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"If you believe that the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down in it, and you further believe that some boys not in the employ of the defendant and without defendant's knowledge or consent went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition and the plaintiff was deceived by its then appearance and induced to sit in the seat by reason of being thus deceived, then defendant would not be liable."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"The plaintiff being a married woman and her husband not having joined her in this suit and she and her husband having their present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in the future has been lessened by the injury, and by the laws of that State she cannot recover such damages. You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Plaintiff cannot recover anything on account of her diminished capacity to labor because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession, or occupation, and her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the western district of Arkansas and in holding that said court committed no error in charging the jury as follows:

"If you find for plaintiff, in assessing her damages, you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof."

This error was because it allows the plaintiff in error, who is a married woman, to recover damages on account of her capacity to labor and earn money being diminished, when her husband, J. K. Humble, is not a party, and said damages cannot be recovered by the wife, and because it appeared at the time of the injury and at the time of the trial the defendant in error and her husband had made the State of Louisiana their home for the future, and in that State the husband and not the wife can recover the damages by reason of the wife's diminished capacity to labor and earn money.

BRIEF.

The following facts clearly appear from the record:

1. That the accident to the plaintiff, Emma Humble, occurred in Arkansas, and that at that time she was and still is the wife of J. K. Humble, whose domicile then was and still is in Shreveport, Louisiana:

2. Under the laws of Louisiana, damages for injuries to the wife from negligence are community property for which the right of action is solely in the husband. The statutes of Louisiana on the subject are as follows:

"ART. 2399. Every marriage contract in this State superinduces of right partnership or community of acquits or gains, if there be no stipulation to the contrary.

"ART. 2400. All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquits and gains between citizens of this State.

"ART. 2401. A marriage contracted out of this State between persons who afterwards come here to live is also subject to community of acquits, with respect to such as is acquired after their arrival.

"ART. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration, and enjoyment either of right or in fact of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because in that case the period of time when the purchase is made is alone attended to and not the person who made the purchase.

"ART. 2404. The husband is the head and master of the partnership or community of gains, he administers its effects, disposes of the revenue which they produce, and may alienate them by an owner's title without the consent and permission of his wife."

3. In Arkansas a wife may sue alone for damages for injuries to her person caused by negligence, but the statute does not authorize the wife to recover for loss of earning capacity when she is not engaged in any separate trade, labor or business on her own account. The laws of Arkansas on this subject are as follows:

"SEC. 5641. Where a married woman is a party her husband must be joined with her except in the following cases:

"1st. She may be sued alone upon contracts made by her in respect to her sole and separate property or in respect to any trade or business carried on by her under any statute of this State.

"2nd. She may maintain an action in her own name for or on account of her sole or separate estate or property or for damages, against any person or body corporate for any injury to her person, character or property.

"SEC. 4946. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

These and other sections of the Arkansas Statutes relating to married women are reprinted in this brief *(infra,* 18, 19*)*.

4. At the proper time defendant moved that the husband of the plaintiff be made a party plaintiff, because

he could also recover damages upon the same proofs. The motion was overruled and exception taken (Tr., p. 9). The same point was secured by assignment of error No. II.

5. Exception was saved to the action of the trial court in admitting evidence tending to show that plaintiff's capacity to labor or earn money had been lessened, because :

(a) She had not proved that her ability to labor was of any value at the time she was injured (Assignments of Error, Nos. VI. and VII.).

(b) Because she was a married woman suing alone and without her husband joining in the suit (Assignment of Error No. VIII.).

(c) Because her husband was not joined in the suit and was domiciled in Louisiana, in which State the wife cannot recover damages for the injuries complained of (Assignments of Error Nos. X. and XII.).

(d) Because there is no pleading or evidence that plaintiff was engaged in business on her own account, and her lessened capacity to perform household duties cannot be a basis for recovery by her (Assignments of Error No. XI.).

6. Exception was duly taken to the charge to the jury that the plaintiff could recover for diminished capacity to earn money (Tr., p. 35) ; and to the refusal of the Court to charge as requested by the defendant, the converse of that proposition (Tr., pp. 32–34).

An important question in this case is as to whether the right of action is governed by the law of the plaintiff's domicil ; to-wit, Louisiana, or whether the right to sue

and maintain the action is governed by the laws of Arkansas, where the accident occurred. Whether it is the one or the other we shall endeavor to show that the judgment below, and the views of the Circuit Court of Appeals supporting it are erroneous, and that the judgment should be reversed.

I.

Plaintiff being a married woman, her domicil was in Shreveport, in the state of Louisiana, where her husband resided, and the laws of that state control the marital rights of the wife; and by the laws of that state compensation for personal injuries to a married woman belongs to her husband and he alone can sue therefor.

The laws of the state of Louisiana on the subject matter of this proposition, to-wit, Articles 2399-2404 of the statutes of that state, are quoted *supra* (p. 9). It is admitted in the record (p. 9) that at the date of the injury, as well as at the time of the trial, "plaintiff was a married woman, and that J. K. Humble was her husband both now and at the date she was injured, and that her husband then lived and now lives in Shreveport, La., as his home." It furthermore appeared from her own testimony (Tr., p. 15), that her husband lived at Shreveport, and that she went there for the purpose of making that her home. Under these circumstances the domicil of the husband became that of the wife (*State vs. Barrow, 14 Texas, 183; Anderson vs. Watt, 138 U. S., 694, 706; Nichols*

vs. Nichols, 92 Fed. Rep., 1; Story's Conflict of Laws, Sec. 136; Schouler on Domestic Relations, Sec. 38; Cord on Legal and Equitable Rights of Married Woman, Sec. 1116).

It is distinctly held under Articles 2399-2404, *supra*, of the Code of Louisiana, by the Supreme Court of that state that compensation for an injury to a married woman belongs to her husband *(Ford vs. Brooks, 35 La. Ann., 157; White and husband vs. Railway, 42 La. Ann., 990).* This matter is of great importance, because if the law of Louisiana applies to the rights of the husband the present judgment for $9,000 in favor of the wife is no protection to the defendant in Louisiana or even in Arkansas against another action brought by the husband for the same injury.

The supreme test is this: suppose that J. K. Humble, the husband, should sue the Texas & Pacific Ry. Co. in the State of Louisiana, based on the same injury, *per quod servitum amisit*, and the railway company should plead the judgment in this case as a former recovery, the husband would reply that he was not a party to the suit in which this pleaded judgment was rendered, then would the former recovery be a bar to a husband's suit? Now, it cannot be answered that the defendant has no concern in the matter as to whether the recovery goes to the husband or to the wife. That might be so answered, and could be successfully answered if the husband had been a party to and bound by the first judgment.

The husband and wife removed to the State of Louisiana, hence their future acquisitions were controlled by the laws of that State. This right to sue for damages was a right acquired after the domicil was fixed in Louisiana, and the law of that State gave it to

the husband *(White vs. Railroad, 42 La. An., 990)*. So a plea that the wife had recovered on the same cause of action in a suit to which the husband was not a party would be no defense to the suit by the husband, and if this judgment stands, the Railway Company will be put in jeopardy of having to pay twice for the same cause of action.

The statute of Texas provided that all property acquired by a husband or wife during the marriage shall be community property, except any acquired by gift, devise, or descent (Revised Statute of Texas, 2968). Under this statute the Supreme Court of Texas has held in the case of *Ezell vs. Dodson, 60 Tex., 331*, that damages recovered for injury to the wife is community property, and must be sued for and recovered by the husband. That case further holds : " The right to sue for damages for a tort is a chose in action, and property within the legal sense of that term." Citing, 2d Bishop on Married Women, Sec. 271 *(C. B. & Q. R. R. vs. Dunn, 52 Ill., 260)*. To the same effect is the case of *Hawkins vs. Front Street Ry., 3 Wash. St., 592)*.

We therefore insist that, inasmuch as the action in this case, to wit, a common law action for negligence, is transitory, and the right of recovery is given by the statute of Louisiana exclusively to the husband, any action brought to enforce this right must necessarily be in the name of the husband and cannot be maintained by the wife, and for this reason the court erred in overruling the defendant's objection to the evidence offered by the plaintiff, as shown in the Record on page 12, and in refusing the various requests to charge as asked by the defendant (Tr., pp. 32-34) and in charging the jury in plaintiff's favor (Tr., pp. 34, 35).

If, however, the laws of Louisiana do not govern the right of the parties to this action, but the laws of Arkansas govern as to the right as well as to the remedy, we then insist, for the reasons to be hereafter stated in this brief, that—

II.

Damages for the impairment of a wife's capacity to earn money, she not being in business on her own account, and damages for the impairment of her ability to serve in the household belong to her husband and not to her.

The admission of evidence and the charge of the Court as to the impairment of her capacity to earn money and to perform her household duties were clearly error.

Inasmuch as the statute of Arkansas on the subject of married women, relating to this action, adopted *April 28, 1873*, is a transcript of the legislation of New York of 1860 and 1862, which had been authoritatively construed by the Court of Appeals of New York, prior to its adoption by the State of Arkansas, it is presumed, according to the settled rule that, in re-enacting the statute, there was also re-enacted with it the construction which had then been put upon it by the Courts of the state from which it was adopted, if there is nothing to show a contrary intent.

In her complaint Mrs. Humble alleged, as the ground for asking damages, the following (Tr., p. 3) :

" Plaintiff alleges that said last-named injury is permanent, has been and always will be painful, and that she must always wear a truss or some similar appliance and be debarred from performing many of her household duties, such as lifting, or she must submit to a surgical operation which will be painful and dangerous.

" Plaintiff was, at the date of her injuries as aforesaid, thirty-six years of age, and her expectancy of life was thirty years ; that she had been accustomed to do and had done all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month ; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one-half.

" Plaintift alleges that, by reason of the negligence of the defendant in failing to provide and maintain said seat in a reasonably safe condition, she has been humiliated and damaged, as before stated, in the sum of twenty-five thousand dollars."

The Court will note that plaintiff did not allege in her complaint that she was at the time of the accident, or had previously been, engaged in any business or occupation on her own account, and that she makes no claim for damages by reason of the impairment of her ability to do business or to work on her own account, but claims damages only *because her capacity to perform her household duties* was lessened. Plaintiff had not been in business for herself for several months before the accident.

As the trial Court charged the jury that they could not find damages for plaintiff's humiliation at the time of the accident (Tr., p. 35), it is to be assumed that the verdict did not include such damages, but was for the

impairment of her ability to perform household duties only.

We submit and insist that under the statute of Arkansas (quoted *infra*,) the wife unless she is actually engaged in some business or service in which she would, but for the personal injury for which she seeks compensation, have earned something for her separate benefit, and which she has lost by reason of the injury she has sustained, cannot recover damages for an impairment of her capacity to labor or to perform her household duties, for such damages do not belong to her, but to her husband, who has suffered the loss.

In a proper action, namely, where she is actually engaged at the time of the alleged wrongful act in some business or service in which she would, but for that act, have earned something for her separate benefit, she may recover for her own loss resulting from her own incapacity to continue in business on her own account, a right conferred upon her by the statutes known as the "Married Women's Acts;" but she cannot recover damages for the loss or impairment of her mere capacity to labor, or of her ability to *serve in the household*, the right to which has been vested in the husband from time immemorial, and has not been divested or taken away by the married women's acts of Arkansas, or by any other legislation of the State.

These propositions have been announced and upheld in the State of New York, construing statutes from which the laws of Arkansas on this subject were copied almost *verbatim*.

For convenient comparison we place these statutes in parallel columns:

Arkansas Statute.	New York Statute.
Adopted April 28, 1873.	*Laws of 1860, Chapter 90.*
Digest Statutes of Arkansas. Sandel & Hill. 1894.	
Sec. 4945. The property, both real and personal, which any married woman now owns as her sole and separate propety; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent.	Sec. 1. The property, both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent.
"Sec. 4946. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and	Sec. 2. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any

perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

"SEC. 5641. Where a married woman is a party her husband must be joined with her except in the following cases:

"1st. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"2nd. She may *maintain an action in her own name* for or on account of her sole or separate estate or property, or *for damages against any person or body corporate for any injury to her person, character* or property."

labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name.

SEC. 7. Any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole. And any married woman may bring and *maintain an action in her own name for damages against any person or body corporate for any injury to her person or character* the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property.

[The Amendatory Act of 1862 re-enacted the above *verbatim* and only added a clause relating to bonds or undertakings by married women in suits by or against them.]

The purpose of Section 5,641 of the Arkansas statute above quoted, and that of the corresponding section (7) of the New York statute is very plain when we consider the common law rule, and the change which the statute was intended to effect. The common law rule in cases as to parties plaintiff in actions for negligence at common law is stated in Reeve on Domestic Relations, quoted in this brief *infra*, page 36. It is also stated as follows by Thompson on Negligence (Vol. 2, p. 1240, Section 15):

"Two separate causes of action may arise at common law from the same injuries inflicted upon the person of the wife during coverture; one in the name of both husband and wife, for her own injuries; the other in the name of the husband, for the damages sustained by him in the loss of her services and society—*per quod consortium amisit*. Although these causes of action originate in the same injuries, the damages to be recovered are entirely separate and distinct. Where the husband and wife are joined, he is but the nominal plaintiff, the injury to the wife being the meritorious cause of action, and the measure of damages is the injury she has herself sustained. In such an action nothing can be recovered for the loss of her services to her husband, or for the expense of her cure. Where the husband sues alone to recover for injuries inflicted upon his wife, the action is based upon the damages sustained by him in the loss of her services, the expense attendant upon her cure, and other incidental expenses."

Inasmuch as, for an injury to the person of a married woman, she had the meritorious cause of action, the statutes above mentioned intended to dispense with the necessity of making the husband a party plaintiff; but as the husband is still the head of the family, bound for its support, and is entitled her services in the household, and in all cases where she does not carry on trade or business, or perform any labor or service on her sole and separate account, the right

to her services is still his, and he is still entitled to sue for the loss thereof; and this right was not intended to be affected by the New York or Arkansas statutes. In other words, the legislation above quoted, relating to the wife's right to sue in her own name, was not intended to affect, and does not affect, the right of the husband to recover for consequential damages for loss of services in any other cases than those in which, by these statutes, she is entitled solely to sue. Such is the correct and settled construction of the New York statute, and was such at the time of its re-enactment in Arkansas, as we now proceed to show.

It will be perceived that these statutes do not make a married woman wholly discovert. They recognize the status of coverture and the general rights of the husband, and then make in favor of the wife certain specified exceptions, but among these exceptions is not the right to recover in her own name for diminished capacity to perform household labor. This is a right which still belongs to the husband, for the husband is still bound to support his wife and is still the head of the family.

The leading case construing the New York statutes above quoted is that of *Filer vs. New York Central R. R. Co.*, 49 N. Y., 47, (1872). The facts, as stated by the court, are these: The plaintiff, a married woman, brought an action in her own name to recover damages for an injury sustained by her while a passenger on the defendant's cars. The plaintiff left Rochester for Fort Plain on the evening of the 4th of November, and was injured at Fort Plain as a result of a wrongful order of the Company's brakeman, obeying which the plaintiff's clothes caught in the steps of the

car and she was thrown down, with the result that she was badly injured and permanently disabled. For this injury two separate and concurrent actions were brought: One by William T. Filer, her husband, suing alone, against the railroad company, which is reported in 49 N. Y., 42, and the husband recovered in that case for the damages sustained by the wife. The wife also brought the action first above mentioned, reported in the same volume, page 47, in her own name, and she recovered in the court below. The jury were instructed to give her, if the Company was found to have been negligent, "such an amount of damages as they thought she was entitled to for the pain and suffering consequent upon her injury, and for *any disqualification for labor* in the exercise of her natural powers." That is to say, the jury were instructed, as the Court states, that the wife "was entitled to recover consequential damages resulting from her inability to labor" (p. 55). The court of appeals held that this instruction was erroneous and reversed the judgment in favor of the wife and ordered a new trial. ALLEN, J., giving the opinion of the court, said the instruction

"was not qualified or explained, and must be held as an instruction that the plaintiff was entitled to recover consequential damages resulting from her inability to labor. That was put forth as a distinct item of damages proper to be allowed, and was not referred to as evidence of the extent of the injury and consequent pain and suffering." * * *

"There was no claim that the plaintiff was at the time of the injury, carrying on any business, trade, or labor, upon or for her sole and separate account. Her services and earnings belonged to her husband; and for loss of such services, caused by the accident, he may have an action; and another record before us shows that he has recovered for them, as he lawfully might do (Reeves' Dom. Rel., Parker's Ed., 138, and

cases cited, marg. p. 63). The laws of 1860, chap. 90, permit a married woman to carry on any trade or business or perform any labor or services on her sole and separate account, and give to her her earnings from her trade, business, labor or service; and she is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury, and for direct and immediate damages, unless she is on her own account and for her own benefit, engaged in some business in which she sustains a loss.

"The amendatory Act of 1862, chap. 172, does not enlarge the rights of the wife or detract from the rights of the husband, or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another."

"Consequential damages are in all cases limited to the amount actually sustained; and unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages; she has lost nothing pecuniarily by reason of her inability to labor. The recovery was large, and was probably affected by the instruction that the inability of the plaintiff to labor constituted one of the items of damage to be taken into account by the jury.

"For this error in the charge the judgment should be reversed and a new trial granted."

No other result was possible, unless the Court should deny that the husband, under any circumstances, could recover for the loss of the wife's services; no other result was possible, unless the defendant was to be subjected to a double liability for the same thing—one to the husband, and one to the wife.

The present case of Mrs. Humble, in its facts and in its principles, is precisely the same as in the case of Mrs. Filer. The statutes of New York and Arkansas are identical. This case of *Filer* was decided before the Arkansas statute was enacted, and unless this

court shall hold that the Filer case was not only wrongfully decided, but also that the known construction of the New York statute by the highest court of that state at the time of the re-enactment of the statute in Arkansas does not carry with it the construction put upon the New York statute by the Court of Appeals of that state,—we say unless this Court shall hold as above, the judgment of the Circuit Court of Appeals in the present case must necessarily be reversed. The doctrine of the *Filer* case has been repeatedly followed and is settled law in that State.

In the case of *Brooks vs. Schwerin, 54 N. Y., 343* (1873), action was brought to recover damages for a personal injury to the plaintiff, a married woman, caused by being knocked down and run over by the defendant's horse and wagon in a street in the city of New York on the 13th of April, 1865. The case is correctly stated in the head-note as follows:

"Plaintiff, a married woman, was run over and injured by defendant's horse and wagon. Before the injury she took charge of her family, and she also worked out by the day, earning $1.25 per day. To the proof of this fact upon the trial defendant objected on the ground that her time and services belonged to her husband. The court overruled the objection, and also refused to charge that she could not recover for her time and services while disabled. *Held* (LOTT, Ch. C., and GRAY, Ch. C., dissenting) no error; that had defendant requested a charge that she could not recover for the loss of services to her husband in the discharge of her domestic duties, the request could not properly have been refused, but the request, proceeding upon the idea that all her time and services belonged to her husband, was properly denied.

"The case of Filer v. N. Y. C. R. R. Co. (49 N. Y., 47) distinguished."

By reason of the fact that she was earning at the time of the injury $1.25 a day, the majority of the

Court held that a general charge that she was not entitled to anything was too broad, and there was no error in refusing it, but said, as appears below:

"If the defendant had requested the court to charge that the plaintiff could not recover for the loss of service to her husband in his household in the discharge of her domestic duties, the request could not properly have been refused. But the request was broader, and proceeded upon the idea that all her time and services belonged to her husband, and that she could not recover anything for the value of her time, or for the loss of any service while she was disabled. She was earning in an humble capacity ten shillings a day, and so far as she was disabled to earn this sum, the loss was hers, and the jury had the right to take it into account in estimating her damages."

The minority held not only this but went further, and held that she was not entitled to recover anything under the circumstances in this case. In giving the opinion of the court, EARL, C., said (p. 348):

"At common law when a married woman was injured in her person, she was joined with her husband in an action for the injury, and in such action nothing could be recovered for loss of service or for the expenses to which her husband had been subjected in taking care of and curing her. For such loss of service and expenses the husband alone could sue (1 Chitty Pl., 84). It is now provided by section 2 of chapter 90 of the Laws of 1860, that a married woman 'may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and seperate property, and may be used or invested in her own name.' This statute effects a radical change of the common law which gave the husband the right to the labor, services, and earnings of his wife. *The services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such service she still bears to him the common-law relation. So far as she is injured so as to be*

disabled to perform such service for her husband, the loss is his and not hers; and for such loss of service he and not she can recover the wrong-doer. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole,* and so far as she is disabled to perform such service by any injury to her person, she can in her own name recover a compensation against the wrong-doer for such disability as one of the consequences of the injury, under the seventh section of the same act, which provides that 'any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole,' and the money recovered shall be her sole and separate property."

The other judges, speaking through LOTT, CH. C., after referring to the above quoted provisions of the New York statute of 1860, as amended in 1862, which is identical in language with the Arkansas statute, said (p. 351):

"These provisions, while securing to a married woman compensation for personal injuries as her sole and separate property, and giving to her the right to sue for it in her own name, do not give her a right to sue for her labor and services unless 'performed on her sole and separate account;' and the earnings that are secured to her as her sole and separate property, are such as arise and result fron her labor and services performed on her sole and separate account; and it has recently been decided by the Court of Appeals that, unless the wife is actually engaged in some business or service in which she would (but for the personal injury for which she is entitled to compensation) have earned something for her separte benefit, and which she has lost by reason of the injury, she has sustained no consequential damages, having lost nothing pecuniarily by reason of her inability to labor. This is placed distinctly on the ground that the services and earnings of the wife belong to the the husband, and that he may maintain an action for them when she, at the time of the injury, was not carrying on any business, trade or labor upon or for her sole and separate

account (See H. M. Filer vs. The New York Central Railroad Co., 49 N. Y. R., 47, etc.).

" The facts disclosed in the present case do not entitle the plaintiff to a recovery for the value of the services lost while she was disabled."

The case of *Blaechinska vs. H. Mission and Home, 130 N. Y., 497* (1892), is thus stated :

" The plaintiff, a married woman, brought this action to recover from the defendant, a charitable corporation, the damages that she claims to have sustained through its alleged negligence in maintaining a broken cover over a coal-hole in the public sidewalk, which caused her to fall and break her arm. The pleadings presented the usual issue as to the negligence of each party, and the jury rendered a verdict in favor of the plaintiff for five hundred dollars."

The two first head-notes of the case state the facts sufficiently correctly :

" The provision of the act in relation to married women (Chap. 90, Laws of 1860, as amended by chap. 172, Laws of 1862), making the property a married woman ' acquires by her trade, business, labor or services, carried on or performed on her sole and separate account,' her separate property, does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services, having no connection with a separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable.

" In an action by a married woman to recover damages for injuries sustained through the alleged negligence of defendant the plaintiff was permitted to testify, under objection, that before the accident she did the housework and worked for her husband as a seamstress, receiving from him a weekly salary, but because of the injury was no longer able to do this work. The court charged that if plaintiff was entitled to recover she could recover for the loss of wages she had sustained.

Held, error; that plaintiff could recover actual damages only; and that the consequential damages for loss of her services, both in the house and as seamstress, could be recovered only in a separate action brought by her husband in his own name."

In giving the unanimous judgment of the Court VANN, J., cites the New York cases arising under the married woman's act as follows: *Reynolds vs. Robinson*, 64 N. Y., 589; *Coleman vs. Burr*, 93 N. Y., 17; and the case of *Filer vs. N. Y. Central R. R. Co. (supra)*, which it denominates the "leading case" upon the subject, and then sums up the law of New York in the following language:

"Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only, and that the consequential *damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, but the damages for the loss of her services belong to him, because the common law gave them to him, and the statute has not taken them away.*"

We confidently claim that the rule of the New York Court of Appeals, as stated in these cases, is a correct exposition of the law and of the statutes in question, and is the law of Arkansas on the question now presented.

The effect of the New York decisions is stated by Judge COOLEY as follows (Const. Limitations, 5th ed., 64 Marg., p. 52):

"And where a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been give given it in such last-mentioned State, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case."

The general rule, as pronounced by this Honorable Court is to adopt the construction of the courts of the State by whose legislature the statute was originally adopted.

Cathcart vs. Robinson, 5 Pet., 264, 280.
McDonald vs. Hovey, 110 U. S., 619.
Allen vs. St. Louis Bank, 120 U. S., 20, 34, and cases cited.
Metropolitan Rd. Co. vs. Moore, 121 U. S., 558, 572.
Logan vs. United States, 144 U. S., 263, 302.
Interstate Commerce Commission vs. Balt. & O. Rd. Co., 145 U. S., 263, 282.
Hedden vs. Robertson, 151 U. S., 520, 526.

Exceptions have been made to this general rule in cases where the courts of a State adopting a statute from another State have put a different construction upon the statute from that of the courts of the State where it originated.

Coulam vs. Doull, 133 U. S., 216, 233.
Whitney vs. Fox, 166 U. S., 637, 647.

It has been decided in Arkansas that earnings of a married woman arising from labor or services done and performed *on her sole account* become her separate property *(Sellmeyer vs. Weleh, 47 Ark., 485)*; but we fail to find any adjudication by the courts of that State that her earnings from labor, not on her own account under the statute or for her service *in the household*, are also her separate property, nor do we find any case there in which the question now presented is discussed. The Circuit Court of Appeals in this case says there are no local decisions on this point (Record, p. 48).

The exception to the general rule of this Court does not, therefore, apply to this case.

We also urge that the rule adopted by the highest court of the State of New York is the result of a true, proper and reasonable construction of these statutes; nor does it stand alone. The same conclusion has been reached in other States, as will hereafter be shown.

The verdict in this case was for the large sum of $9,000, and the record shows that the basis of this recovery was largely plaintiff's diminished earning capacity. Thus, the complaint states:

"Plaintiff alleges that said last-named injury [a rupture] is permanent, has been and always will be painful, and that she must always wear a truss or some similar appliance, and be debarred from performing many of her household duties, such as lifting, or she must submit to a surgical operation, which will be painful and dangerous.

"Plaintiff was, at the date of her injuries as aforesaid, thirty-six years of age, and her expectancy of life was thirty years; that she had been accustomed to do and had done all the household work for her family, which consisted of her husband and three children, and her working capacity was of the value of twenty-five dollars per month; but since said injury she has been able to perform only light work, and that the value of her working capacity has been reduced one-half" (Tr., p. 3).

There was no claim that the plaintiff, at the time of the accident, was engaged in any work or labor for her own behalf. The contrary was distinctly shown. This ground of liability was distinctly avowed by the plaintiff's counsel on the trial of the case, and evidence was offered, over the defendant's objection and exception, "solely for the purpose of showing capacity of the plaintiff to earn money" (Tr., p. 12). On the trial, against the defendant's objection, evidence of the plaintiff and of the medical witnesses was offered to show that her injury was permanent, to show her age

to be, as alleged, thirty-six years (and thus prove her expectancy of life to be thirty years, as alleged in the complaint, Record, p. 3), and her diminished capacity to earn money. Indeed, the evidence to show this diminished capacity of the wife to earn money constituted the whole bulk of the testimony. This was received against the defendant's objection, the record stating (p. 32) :

" The defendant objects to all evidence going to show the plaintiff's capacity to labor was diminished by the injury, and the court overruled the objection, and the defendant then excepted."

The court refused several charges requested on behalf of the defendant, that the plaintiff could not recover anything for diminished earning capacity, she not being engaged in any separate business on her own account. Thus, among other requests, the defendant asked the court to charge as follows :

" Plaintiff cannot recover anything on account of her diminished capacity to labor.

Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation.

" And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery " (Tr., pp. 33, 34, Charge No. 7).

This was refused and the defendant excepted (Tr., p. 34).

The contrary of these requests in this respect was charged by the court, as follows :

" If you should find for the plaintiff, in assessing her damages you will take into consideration her age *and earning capacity* before and after the injury was received," etc. (Tr., p. 35).

This charge was duly excepted to (Tr., p. 35).

It is, therefore, incontestable that the recovery embraced not only damages for physical injury of the plaintiff, but also *for her diminished earning capacity* by reason of a permanent injury extending throughout her life.

The Circuit Court of Appeals, in its opinion (Tr., p. 45), made no reference to the character of the damages to be recovered by a married woman, but held that under the Arkansas statute providing that she "may maintain an action in her own name * * * for any injury to her person," she may recover all damages resulting from such an injury.

On the other hand, SANBORN, J., in his dissenting opinion, says (Tr., p. 49) that under the statutes of Arkansas "the logical result seems to me to be that the husband may, and the wife cannot, recover for the loss of the wife's services or for the diminished capacity to labor, which is the same thing," citing *St. Louis, Iron M. and S. Ry. vs. Henson, 58 Fed. Rep., 531;* s. c. *19 C. C. A., 169*, where the same Circuit Court of Appeals held that the statutes of Arkansas relating to married women, providing that their earnings shall be their sole and separate property, does not divest a husband of the right to his wife's services, nor where her death has been caused by negligence, preclude him from recovering for the loss of such services.

We ask special attention to the case of *Henson*, last above cited, which was decided by the Circuit Court of Appeals of the 8th Circuit, CALDWELL, SANBORN and THAYER, JJ., October, 1893.

This decision is in direct conflict with the decision in the case now at bar. In *Henson's* case, the action was brought by the husband, in the Circuit Court of the United States for the Eastern District of Arkan-

sas, against the railway company, to recover damages for the alleged negligent killing of his wife by the railway company. She was traveling in a boarding car attached to one of its trains. There was a trial by a jury, and a verdict and judgment for the husband. Note that he brought the action for the death of his wife through the negligence of the railway company. The statute of Arkansas giving a right to recover for an injury resulting in death was as follows:

"SECTION 5908. For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer."

By the act of March 6, 1863, Section 5912, it is likewise provided that

"Every such action shall be brought by and in the name of the personal representative of such deceased person, and if there be no personal representative, then the same may be brought by the heirs at law of such deceased person."

On February 3, 1875, the legislature passed an act as follows:

"SECTION 5910. When any adult person be killed by railroad trains running in this state, the husband may sue for damages to a wife. If the adult be wounded, he may sue in his own name."

In the case of *Henson*, as appears in the note to Sandels & Hill's Digest of the Statutes of Arkansas (p. 1310), it is stated:

"This portion of section 3, act of February 3, 1875 [Section 5910], was not carried into the last Digest, and as there is no express repeal of it, nor repeal by necessary implication, in the opinion of the Digestor, it is inserted. The question as to whether it is re-

pealed is fully and ably argued in the briefs of counsel in case of *St. L. S. W. Ry. vs. Henson*, in U. S. Circuit Court of Appeals for this circuit, reported in 58 Fed., but the case was determined upon another issue, leaving this important question undecided."

The Circuit Court of Appeals held, in that case, that aside from the said act of February 3, 1875, and notwithstanding the provisions of Sections 5908 and 5912, which, in express terms, give the right of action to the personal representatives or heirs, and not the husband, and notwithstanding the Married Women's Act, giving the wife the right to carry on any trade or business, and perform any labor or service on her sole and separate account, and that the earnings of a married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested in her name, the husband may recover in such case for the loss of the services of the wife caused by her death.

CALDWELL, J., says (p. 533):

"The contention of the plaintiff in error is that, under this [married women's] act, the husband has no valuable right in the services of his wife, and that he suffers no pecuniary loss by her death. This act does not put the wife on the footing of a concubine to her husband. It does not relieve her from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all Christian peoples."

The Court in *Henson's* case affirmed the judgment of the Court below, giving the husband a right to recover for the loss of the services of the wife caused by her death, the Court below having stated to the jury, "You are to say in dollars and cents what the value of her services should

be." In short, that case decides that the earning capacity or value of the services of the wife belong to the husband, except such as are made hers by the Married Women's Act (where she is engaged in labor or services on her own account, or for others); and Judge SANBORN is, therefore, right in the position taken in his dissenting opinion in this case (Tr., p. 49), that the decision in the *Henson* case is in direct conflict with the decision of the Circuit Court of Appeals in the case now at bar.

It is generally held by the State Courts that damages resulting in the loss or impairment of the wife's services belong to the husband.

AUTHORITIES IN OTHER STATES.

In Texas, where the statute provides that all property acquired by a husband or wife during the marriage shall be community property, except any acquired by gift, devise or descent, the Supreme Court of that state has decided that damages recovered for injury to the wife is community property and must be sued for and recovered by the husband, and that the right to sue for such damages is a *chose in action* and is property in the legal sense.

Ezell vs. Dodson, 60 Tex., 331, citing 2 Bishop on Married Women, Sec. 271, and *Chicago, B. & Q. R. R. vs. Dunn, 52 Ills., 260.*

Same general doctrine in other states, see

Hawkins vs. Front St. Ry., 3 Wash. St., 592.
Redfield vs. Oakland St. Ry., 112 Cal., 220.
Union St. Ry. vs. Stone, 54 Kans., 83, 100.
Henry vs. Klopfer, 147 Penn., 178.
Scott vs. Metropolitan Ry., 4 McKay, 152.
2 Rorer on Railroads, p, 1094.

Reeve Domestic Relations, 4th Ed., pp. 87, 89, and note:

"But it may be remarked here that general statutes empowering a married woman to perform labor and services on her own account do not necessarily, in the absence of express provisions to that effect, abrogate the common-law rule on this subject. It is conceived that the husband's common-law right to her earnings would remain unaffected unless it can be shown that the services were rendered under an understanding the she should receive the pay therefor or at least under circumstances showing her intention to take advantage of the statutory privilege of performing such services on her sole and separate account and an election on her part to exclude her husband from the benefit thereof." "But as a general rule, at least, it is clear that the wife's right to sue alone in such case does not affect the husband's right to sue alone for his consequential damages arising from the loss of his wife's services, *consortium*, or for expenses incurred and the like. And in the absence of a statute, and except where the wife is carrying on a separate business or trade, or working on her sole and separate account, it is manifestly error to include in the wife's claim for damages a claim for her loss of time or expenses incurred." Citing.

Birkbeck vs. Acknoyd, 74 N. Y., 356.
Sheo vs. Maloney, 52 Conn., 327.
Hoyt vs. White, 46 N. H., 45.
Haggelleaker vs. Goodfellow, 64 Ill., 238.
McCoy vs. Hyatt, 80 Mo., 130.
Tuttle vs. R. R., 42 Iowa, 518.

The case of *Harmon vs. Old Colony R. R. Co., 165 Mass., 100,* which was relied upon by counsel for defendant in error to support their contention that the impairment of a married woman's capacity to perform labor may be considered as an element of damages in an action by her for personal injury, is not only not applicable to the case at bar, but inferentially tends to support the claim of plaintiff in error. In the Harmon case the plaintiff was *engaged in business on her own account,* keeping a restaurant, and she

alleged as damage that she "is not able to attend to the same now and is incapacitated from doing so in the future, and has thereby suffered great loss and damage in her business;" she asked no damages for lessened ability to labor generally or to perform her household duties. In the case now presented there is no allegation nor proof that plaintiff was engaged in any business or occupation on her own account, and she claims damages only on the ground that her capacity to perform her household duties is impaired. Under these circumstances the remarks of the court, in the *Harmon case* must be read as referring only to damages caused by the plaintiff's incapacity to attend to her own private business, and not to labor generally or perform the services due her family in the household. The decision is not inconsistent with the New York rule. We respectfully submit that the rule announced in the New York cases is just and equitable, preserving to the husband the rights which have always been vested in him, and to the wife the rights secured to her by the legislation, which to the prescribed extent and only to such extent has emancipated her from the rules of the common law.

III.

Under the circumstances of this case plaintiff's husband should have been made a party, in order to secure justice to all parties in interest and to prevent the subjection of the Railway Company to another action by him for the same damages.

It is evident from what has already been presented that a right of action for the damages claimed in this case, for loss of service, is vested in the husband of plaintiff. It follows that the defendant company should have been protected by the trial court from the possibility and probability of another recovery by him on the same cause of action and on the same proof. The court refused to perform this act of justice by overruling defendant's motion that the husband be joined with his wife as plaintiff (Tr., pp. 9 and 52).

The remarks of the Circuit Court of Appeals in its opinion (Tr., p. 45) do not apply to this point because the Court assumed that the Arkansas statutes authorized a married woman to sue for *all* damages for personal injuries of whatever nature in a separate action. That this is not a proper construction of the statute we believe we have established.

We also contend that the husband should have been made a party plaintiff because he was domiciled in Louisiana, which state was also the domicil of his wife (*Anderson vs. Watt*, 138 U. S., 694, 706, and cases cited), and in which State compensation for injury to a married woman belongs to her husband and suit therefor must be brought in his name.

Ford vs. Brooke, 35 La. Ann., 157.
White and husband vs. Railway, 42 La. Ann., 990.

This case presents the anomaly of a wife domiciled in Louisiana suing in Arkansas for damages which under the laws of the domicil belong to her husband, and for which he may recover in an action in that State by himself alone. The motion of

the railway company to have him made a party in this action was eminently proper and should have been granted. If it had been granted there could be no objection of non-joiner; the expense and delay of another suit would have been avoided; the rights of no one would have been jeopardized, and the defendant would have been saved from the danger of being subjected to two recoveries for the same cause of action.

No reason was shown why the husband should not have been made a party plaintiff nor that it was impracticable to enforce the order applied for.

In *Morning Journal Association vs. Smith, 55 Fed. Rep., 141* (1893), cited by counsel for plaintiff at the hearing below there was a demurrer interposed to an action for libel by a married woman, a subject of Great Britain, and it was held that, under Section 450 of the New York Code of Civil Procedure (Laws of 1890, Ch. 248), she could maintain the action without joining her husband. This decision was the only one the court could have rendered under the law, which provides not only that the husband is not a necessary but is *not a proper party* in such an action; and, also, that *all* the recovery shall be the separate property of the wife.

The Section (450 N. Y. Code Civ. Pro.), so far as it is necessary to quote it here, is as follows:

"In an action or special proceeding, a married woman appears, prosecutes and defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of

his wife, and all sums that may be recovered in such actions or special proceedings shall be the separate property of his wife." * * *

The judgment of the Circuit Court of Appeals should be reversed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

File No. 17,597.

Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY CO., — PLAINTIFF IN ERROR.

vs.

EMMA HUMBLE, — DEFENDANT IN ERROR.

TERM No. 177. OCT. TERM, 1900.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On the 9th day of April 1898, the defendant in error, Emma Humble, a married woman, went to the waiting room of the Texas & Pacific Ry. Co., the plaintiff in error, in the Station House in Texarkana, Arkansas. She arrived there about 9 o'clock, p. m. After purchasing a ticket over the railway to Shreveport, she attempted to sit down in the waiting room upon one of the chairs or benches provided for passengers and those

about to take passage on the trains. The back and bottom of the chair consisted of a single piece of bent perforated board that had been nailed or tacked on to the framework of the bench. The nails had come out, and the board had become loose or detached from the framework. As Mrs. Humble sat down the back and the bottom of the seat gave way, and she fell or continued descending down through the framework until she was so wedged in that she could not extricate herself and had to be assisted out by a person present who she didn't know. While confined in the framework of the chair she struggled to extricate herself without avail. Her legs were exposed and she strove to cover them with her dress. Quite a number of persons, strangers, were in the waiting room at the time and many of them laughed while she was in that undignified position. See testimony of Mrs. Humble, printed record pp. 10 and 12, and Willis Abbles r. 15 16. By reason of the fall she was bruised on her head, shoulder and arm. She was also ruptured, a left oblique inguinal hernia, that is incurable, so that she will always be compelled to wear a truss. The bruises were also very painful. Because of the injury, Mrs. Humble's capacity to earn money was reduced from one third to one half. R. 12, 14; 19, 21; 23, 25. She was made incapacitated from all kinds of active work, standing, lifting, stooping, walking, getting about. T. 24.

If she lifts even a chair she is in pain and has to sit down. She cannot run a sewing machine. T. 13.

The station master at Texarkana had been several times notified of the defective condition of this seat and had inspected it. This notice had been given the station master from two weeks to a month prior to the injury and no change or repairs

had been made to the seat or anything else done to give warning of its defective condition. It appeared in perfect condition at the time Mrs. Humble attempted to sit therein. R. pp. 16, 19, 13.

At this time Mrs. Humble had been a resident of the State of Arkansas for more than ten years. She had lived at Pine Bluff in said State until the October previous to her injury and during the last two years at Pine Bluff she had run a boarding house and a public hotel. She kept the boarding house over a year and the hotel for nearly a year. She closed the hotel only three or four days before she came to Texarkana. Both the boarding house and hotel was conducted by her as her sole and and seperate business, and in her own name and was in fact her business. During the time she ran the hotel, she superintended all the work, seeing to everything and often times, would take the place of some of the help, when they had quit or did not come. The condition of her health at Pine Bluff was perfect. R. 10, 12, 13.

When she arrived at Texarkana she boarded for four or five weeks. Then she started to run the Iowa House and staid there about two weeks, and shortly afterwards being *enciente*, commenced and continued boarding until the accident. During this last period she had a miscarriage and was quite ill, but was getting better and recuperating when injured. R. 15.

She was going to Louisiana to join her husband, who was then residing and making his home in that State. R. 11. On account of this negligence and for these injuries and loss to her earning capacity she brought suit against the Railway Company in the Circuit Court of Miller County, Arkansas, where the damage was received. R. 1, 3.

The railway company removed the cause to the Circuit Court of the United States for the Eastern District of Arkansas, Texarkana Division. 3-5. The answer to the complaint is as follows:

"The defendant admits that it is a railway corporation and a common carrier for passengers. It admits that the plaintiff, Emma Humble, went to the depot for the purpose of taking passage on defendant's cars, and had entered the waiting room for that purpose and (———) passage on defendant's cars at about the time named."

Defendant alleges that the plaintiff was at the time of the alleged injury, and is now a married woman.

Defendant denies that the plaintiff, Emma Humble, received any injuries to her person by reason of one of the seats breaking with her. Therefore she ought not to recover." R. p. 7.

BRIEF.

It is complained that there was error in overruling the motion of the Railway Co., to make the husband, J. K. Humble, a party plaintiff. The motion is as follows: "Now comes the Texas & Pacific Railway Company, the defendant in the above cause, and shows to the Court that both now and at the date the plaintiff was injured, Emma Humble was a married woman and her husband's name is J. K. Humble, and if the plaintiff received an injury at the time set out in her complaint for which she was entitled to recover against the defendants, then her said husband could also recover against this defendant upon the same proof.

To the end that all matters may be settled in one suit, this defendant prays that this plaintiff's husband may be made

a party plaintiff." T. 9.

We insist that this motion was properly overruled not only for the reasons set forth by the Court of Appeals but for the following additional ones.

Section 5717. Sandels & Hill's Digest of the Laws of Arkansas under the head of "Pleadings and Practice" provides:

"The defendant may demur to the complaint where it appears on its face, either. * * * *

Fourth. That there is a defect of parties plaintiff or defendant."

Section 5720 *ib*: "When any of the matters ennumerated in section 5717 do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court over the subject of the action, and the objection that the complaint does not state facts sufficient to constitute cause of action."

The complaint did not disclose the fact that Mrs. Humble was a *feme covert*. If her husband was a necessary party then under the Arkansas practice the only way to reach the defect was by answer, and not by motion.

Again the motion is to make the husband a party plaintiff. Suppose he was not willing to be made a party plaintiff and thereby make himself responsible for costs, what would have been the result? Would Mrs. Humble's complaint have been dismissed because she could not have either pursuaded or intimidated her husband into joining with her in the cause, when the Statutes of Arkansas gave her the right

to sue in her own name?

All the other assignments of error save that embraced in the dissenting opinion of Judge Sanborn we shall leave with the reasoning given in the opinion of the majority of the Court and not dissented from by Sanborn, J.

The Constitution and Statutes of Arkansas in relation to married women are as follows:

The real and personal property of any *femme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, device or otherwise, shall so long as she may choose, be and remain her separate property, and may be devised, bequeathed or conveyed by her the same as if she were a *femme sole*, and the same shall not be subject to the debts of her husband." Art. 9, Sec. 7, Constitution of Arkansas.

"The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this state holds or owns at the time of her marriage and the rents, issues, and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interferance or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her chil-

dren by her as his agent. Sec. 4945 S. and H. Dig.

"A married woman may bargain, sell, assign and transfer her separate personal property and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name, and she may alone sue or be sued in the courts of this state on account of said property, business or services." Sec. 4946 S. & H. Dig.

"In an action brought or defended by any married woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if a judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property." Sec. 4949 S. & H. Dig.

"Where a married woman is a party, her husband must be joined with her, except in the following cases:

First. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state.

Second. She may maintain an action in her own name for or on account of her sole and separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property." Sec. 5641 S. & H. Dig.

While we find no recorded utterance from the Supreme

Court of Arkansas involving the precise question upon which the Court of Appeals in this case differed; we do find that it has said in two instances that this legislation was for the protection of the wife's property against the husband's creditors.

Rudd vs. Peters, 41 Ark. 177.

Hoffman vs. McFadden, 56 Ark. 217.

Again Cockrill, C. J. in rendering the opinion of the Court says: "The earnings of a married woman arising from labor or services done and performed on her sole account, becomes her separate property."

Sellmeyer vs. Welch, 47 Ark. 485.

If now the proceeds or results of the earning capacity become the seperate property of the wife, it would seem that the potentiality or capacity to make those earnings must be her separate property. The legislation of Arkansas as to married women is very similar to that of Massachusetts, where the particular question involved has been decided and that able Court used the following language: "By virtue of this legislation, a married woman becomes, in view of the law a distinct and independant person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if any there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view, that

her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given her a right to act independently of him, so far his right and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her service is abridged, though his obligation to support her remains.

It is urged that she may contract to devote her whole time to work which is to be performed away from his house, and which, perhaps, may require her absence for 10 years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part without his consent. To a certain limited extent as, for example, in fixing the domicile, and in being responsible, under

ordinary circumstances, for its orderly management—the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case. The radical nature of the change effected by the legislation of this State in the legal condition of married women is illustrated in numerous decisions of which Jordan vs. Railroad Company, 138 Mass. 425; most nearly resembles the present case."

Harmon vs. Old Colony Ry. Co. 165 Mass. 100.

s. c. 42 N. E. Rep. 505.

Again, the Supreme Court of Montana, where the community law prevails, except as it may have been modified by statute, says: "The first point urged is that the Court should have decided whether the plaintiff, a married woman, could recover damages 'for any impairment of her capacity as a previously healthy woman, if she were such, to earn money.' We think she could. Plaintiff's capacity to earn is her own, and she is entitled to recover for any diminution of her capacity to work that is shown to have resulted from the injury. It is unnecessary to decide, in this case, whether the profits or use of that capacity belong to another. The capacity is her own and

for its impairment she can recover. Jordan vs. Railroad Co., 138 Mass., 425; 2 Sedg. Dam., §486.

2. It was not necessary to specially plead damages done to plaintiff by reason of any impairment of such capacity, as, obviously, where a woman is injured to such an extent as to cause her great pain and suffering in and about her womb, and back she will, until her recovery at least, suffer an impairment of her general capacity to earn money. To what extent plaintiff's capacity was impaired was therefore properly submitted to the jury as part of her general damages. Railway Co. vs. Bowlin, Tex. Cir. App.; 32 S. W., 918; Harmon vs. Railroad Co. (Mass.) 42 N. E., 505."

Hamilton vs. Railway Co., 17 Mont., 334.

It is stated in the dissenting opinion of Judge Sanborn that the loss of the wife's services and her diminished capacity to labor are the same thing, but it seems to us there is a material distinction. Her capacity to labor and earn money was the wife's at the time of her marriage. It will be the wife's still after the marriage may have been dissolved by divorce or the death of the husband. The capacity to labor and the earnings of that capacity seem to us as distinct as a piece of real estate and its crops usufruct or rents. The value of the land would largely be measured by what it would produce, or its rental. Suppose a tract of land, the separate property of the wife, to have been permanently damaged in its rental value by the actionable negligence of another, would not these damages be the wife's separate property under the laws of the state of Arkansas, or would not the wife have some such interest therein that this permanent damage should be taken into consideration by

the jury?

Suppose that Mrs. Humble had been paralyzed so that her earning capacity had been totally, completely and permanently destroyed, could her husband have recovered for this entire permanent damage? If so, these damages could be taken from the husband by execution for his separate debts, however improvidently contracted. As the laws of Arkansas in relation to married women were passed to protect their earnings and property from the husband's creditors, what protection would there be to the paralyzed dependent wife of an improvident or worthless husband, when that husband is allowed to collect, once for all, the value of the entire earning capacity of the wife for her natural expectancy of life and then to have the same at once taken from both him and her by his creditors.

Again, suppose that the husband, as is often the case, was much older than the wife. His expectancy of life is much less than that of the wife. Suppose the husband to have been seventy years of age and the wife thirty-six years, the age of Mrs. Humble. Then according to the Carlisle tables the husband's expectancy is 9.18 years, while that of the wife is 30.32 years. Under the decisions of Arkansas the husband, if entitled to recover, could only recover the amount of her probable earnings during his expectancy, and not for any period beyond.

Fordyce vs. McCants, 51 Ark., 509.

Fordyce vs. McCants, 55 Ark., 384.

If now the husband could only recover for the loss during the nine years of his expectancy, what becomes of the loss for the remaining twenty-one years of her expectancy? Has not

the wife an interest therein?

Where the plaintiff was a washwoman, working out and receiving one dollar a day for her services, which she used in the support of her family, but was a married woman and living with her husband at the time of her injury, it was held that she was entitled in a suit in her own name to recover for the loss of time occasioned by the injury. It was held that she was entitled to recover therefor, the court saying "that it makes no difference how humble or how exalted the employment may be."

Fleming vs. Shenandoah, 67 Iowa, 505.

s. c. 25 N. W. Rep., 752.

Admit that the husband in a suit in his own name for loss of *consortium* and for his wife's services in connection with their domestic affairs might recover, still could not the wife also recover in an action in her name for such services as she might have rendered for others than her husband? What legal interest could the husband have in the moneys received for such outside services or labor? If there would be any right in the wife to recover any amount for such, then there was no error in the instruction of the Court as given that the "jury will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof." T. 35.

Mrs. Humble testified that her means of livelihood for the last few years had been the keeping of a hotel at Pine Bluff (T. 12) and that she had made the living for herself and children for about four years. T. 13.

This testimony tended to show that her earning capacity was of some value. It had been used in her own name.

We believe that under the married woman's statutes in most states that the moneys earned by the wife in keeping boarders become her separate property.

Hedge vs. Glenny, 73 Iowa, 513; s.c. 39 N. W. Rep. 818.

Stratton vs. Bailey, 80 Me., 345; s. c. 14, At. R., 739.

Nuding vs. Urich, 169 Pa., St. 289, s.c. 32 At. R., 409.

If, therefore, there was any evidence tending to show that Mrs. Humble had at the time of the injury any earning capacity, and that it or any portion of it belonged to her as her separate property, then was she entitled to have the jury take this into consideration, even though a portion of the result of that earning capacity, so long as exercised in purely domestic affairs, became the property of the husband.

This proposition is well expressed by Cockrill, C. J., in rendering the opinion of the Court in Fordyce vs. Jackson, 56 Ark., 594, where objection had been made to the charge upon the measure of damage.

"It was the defendant's right to have the rule for the ascertainment of damages specifically defined by the Court, so that the jury would have an accurate guide to conduct them to a proper reward. But the defendant should have requested a more specific charge, if it conceived that the jury would be misled by the general language of the charge. It is the settled practice of this state that a party cannot avail himself of an omission which he made no effort to have supplied in the trial court. Our practice is in accord with the following statement from the text of Judge Thompson's work on Charging the Jury: "Sec. 82. If the charge is not a clear misdirection—if there is a *mere tendency* to mislead the jury—the defendant must ask ad-

ditional explanatory instructions in order to avail himself of its defectiveness in a court of error, but where it *necessarily* * * * * misleads a jury, it is fatal error. Nor will a judgment be reversed because the charge is so general in its terms as to leave it doubtful whether the jury understood its application to the evidence. Here, as in the preceeding case, the remedy of the party is to ask additional instructions before the jury retires. So when the judge has laid down a proposition which, in the abstract, is clearly right, but there is something in the situation of the parties or in their relations to each other which would require a modification of it, and which has escaped the attention of judge, it is the duty of the counsel to call his attention thereto."

"Instructions given by the Court at the trial are entitled to a reasonable interpretation, and if the propositions as stated are correct, they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party, as the party aggrieved, if he supposes the instructions given are either indefinite or not sufficiently comprehensive, is always at liberty to ask that further and more explicit instructions may be given; and if he does not do so he is not entitled to claim a reversal of the judgment for any such supposed error. *Castle vs. Bullard, 23 How. 172.* Courts are not inclined to grant a new trial merely on account of ambignity in the charge of the Court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

Flanders vs. Tweed, 16 Wall. 504.

As stated in the decision of the Court of Appeals. "She,

(Mrs. Humble,) "was entitled to some allowance on this account if the proof showed that her capacity to labor had been impaired by the injuries which she received, since it cannot be maintained under such laws as prevail in the State of Arkansas that a wife's capacity to labor is the exclusive property of her husband."

"A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated and in its precise terms. The Court is not bound to give a modified instruction varying from the one prayed."

Catts vs. Phalen, 2 How. 376.

We therefore insist that the Court of Appeals for the Eighth Circuit did not err in affirming the judgment, for we claim that the earning capacity of the wife under the laws of Arkansas was her separate property, and for its injury she is the sole person that is entitled to recover, or at least that she has some such interest therein as entitles her to have a permanent injury thereto taken into consideration by the jury.

Wherefore we pray the judgment may be affirmed.

Respectfully Submitted,

OSCAR D. SCOTT,

Att'y for Defendant in Error.

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Supreme Court of the United States.

No. 177.—October Term, 1900.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* Emma Humble. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[April 8, 1901.]

This was an action brought by Emma Humble against the Texas and Pacific Railway Company in the Circuit Court of Miller County, Arkansas, to recover compensation for personal injuries sustained by her in the defendant's station at Texarkana, Arkansas, on April 9, 1898, by reason of defendant's negligence, and removed on defendant's petition to the United States Circuit Court for the Western District of Arkansas. Plaintiff obtained judgment, which was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 97 Fed. Rep. 837, and thereupon this writ of error was sued out.

The evidence, in addition to establishing the circumstances of the infliction of the injury, tended to show that Mrs. Humble had been a resident of Arkansas for nearly ten years; that she had kept a boarding house, and a hotel at Pine Bluff, in said State, for some years, conducted by her as her sole and separate business, and in her name, until she left Pine Bluff for Texarkana, in October, 1897, where she remained until April 9, 1898, and during this time began to run a hotel, but became temporarily ill, and gave it up. Her husband had taken up his residence in Louisiana at the time of the injury, and she had then started to go to him.

Prior to the trial, the railway company moved the court to compel Mrs. Humble to make her husband a party plaintiff, but the court overruled the motion, and defendant excepted. Defendant objected to all evidence tending to show that plaintiff's capacity to labor was diminished by the injury, and saved an exception to its admission.

At the close of the evidence defendant requested the court to give the jury certain instructions, of which the third, fourth, sixth and seventh are as follows:

3. "The plaintiff cannot recover any damages on account of her injury diminishing her capacity to labor and earn money, because there is no evidence showing any capacity to labor or earn money at and just before she was injured."

4. "In this case the plaintiff being a married woman and her husband not joining in the suit, she cannot recover any damages on account of her diminished capacity to labor and earn money."

6. "The plaintiff being a married woman, and her husband not having joined her in this suit, and she and her husband having her present and prospective home in the State of Louisiana, then the law of Louisiana would apply as to the right to recover damages by reason of the fact that plaintiff's capacity to labor in future has been lessened by the injury, and by the law of that State she cannot recover such damages.

"You will, therefore, allow nothing as damages for any diminished capacity to labor and earn money."

7. "Plaintiff cannot recover anything on account of her diminished capacity to labor.

"Because there is neither pleading nor evidence showing that plaintiff was engaged in any business, profession or occupation.

"And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery."

The court declined to give these instructions, and each of them, and the defendant excepted to the refusal of each.

The court instructed the jury as follows: "If you should find for the plaintiff, in assessing her damages you will take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs, her physical condition before the injury, and her physical condition after the injury, and the nature and character of the injury she received, whether it be permanent or temporary in its nature, and find for her such sum as will fairly and reasonably compensate her therefor, including therein fair and reasonable compensation for any physical and personal pain and suffering she may have undergone as the result thereof."

Defendant excepted to so much of this portion of the charge as allowed the jury to "take into consideration her age and earning capacity before and after the injury was received as shown by the proofs."

Mr. Chief Justice FULLER delivered the opinion of the Court:

Plaintiff in error contends that the judgment should be reversed because the Circuit Court erred in declining to direct the joinder of the husband; in applying the law of Arkansas in the trial of the case and not that of Louisiana; and in allowing impaired earning power to be considered as an element of recovery.

The statutes of Arkansas provided that a married woman "might maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property." S. & H. Dig. § 5641.

This action was brought in the State court and removed on defendant's application. That transfer could not deprive plaintiff of the right secured

to her by the local law to prosecute the suit in her own name and for her own benefit; and indeed by section 721 of the Revised Statutes, the law of Arkansas furnished the rule of decision. In some jurisdictions it is held under similar statutes that the wife *must* sue alone under such circumstances, and that to make the husband a co-plaintiff works a fatal misjoinder. The Circuit Court was right then in not attempting to compel a joinder which the statute had expressly dispensed with.

But it is said that under the laws of Louisiana compensation for personal injuries to a married woman belongs to the husband; that he alone can sue therefor; and that, therefore, error was committed in the admission of evidence, the refusal of instructions, and in the charge of the court. We do not think the point as now presented was made below. The objection to evidence, the sixth instruction refused, (which referred to the law of Louisiana,) and the part of the charge excepted to, related to diminished capacity to labor. And the motion as to Humble was that he should be joined as a plaintiff. The answer simply raised the issue whether or not Mrs. Humble received any injuries to her person by reason of the acts complained of. It was nowhere insisted that the action could not be maintained because not brought by the husband alone.

However, whether the objection be that under the laws of Louisiana she could not recover in her own name at all, or could not, except her husband was a co-plaintiff, because the damages claimed were community property, we agree with the Circuit Court of Appeals that plaintiff's rights in suing in Arkansas for an injury sustained there did not differ from those of any married woman domiciled in that State; that the legislature of Arkansas had determined by whom a suit might be brought for personal injuries sustained by a married woman; had enlarged the rights of married women in respect of damages recoverable by them on account of personal injuries sustained within the State; and that these laws necessarily enured to the benefit of every married woman who subsequently sued in the courts of the State for personal injuries there sustained, and must be held to have been intended to have, and to have, a uniform operation throughout the State.

The argument *ab inconvenienti* is pressed, that Humble might sue for the same injury in Louisiana, and that this judgment could not be pleaded in bar, although only covering damages particularly pertaining to the wife. In other words, that the Louisiana courts would decline to give any faith and credit to the recovery in Arkansas permitted by the jurisprudence of the latter State in the name of the wife only. We must decline to be moved by the supposed hardship suggested. These injuries were inflicted and this action was brought in the State of Arkansas. The place of the wrong and the place of the forum concurred, and the law of that place governed. If an action should be brought in Louisiana, the fact that

the law of Arkansas differed from that of Louisiana would not prevent its application unless opposed to some general public policy, the existence of which is not to be assumed. *Northern Pacific Railroad Company* v. *Babcock*, 154 U. S. 190.

This brings us to the point on which the chief stress of the argument was laid. The circuit court charged the jury that if they found for plaintiff they might take into consideration in assessing the damages "her age and earning capacity before and after the injury was received, as shown by the proofs," and refused an instruction to the contrary, and exceptions were duly preserved.

In view of the evidence was plaintiff entitled to be allowed anything for diminution of earning capacity?

Section 7 of Article 9 of the Constitution of Arkansas provides:

"The real and personal property of any *feme covert* in this State acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

Sections 4940, 4945, 4946, 4949 and 5641 of Sandels & Hill's Digest of the Statutes of Arkansas are as follows:

4940. "The real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole;* and the same shall not be subject to the debts of her husband."

4945. "The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this State holds or owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her, in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent.

4946. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services."

4949. "In an action brought or defended by any married woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property."

5641. "Where a married woman is a party, her husband must be joined with her, except in the following cases:

"*First.* She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"*Second.* She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property.

"*Third.* Where the action is between herself and her husband she may sue and be sued alone."

The particular point before us may not have been passed on by the Supreme Court of Arkansas, but that tribunal has recognized this legislation as intended for the protection of the wife's property against the husband's creditors, and has held that the earnings of a married woman arising from labor or services done and performed on her sole account become her separate property. *Sellmeyer* v. *Welch*, 47 Ark. 485; *Rudd* v. *Peters*, 41 Ark. 177; *Hoffman* v. *McFadden*, 56 Ark. 217.

Granting that the statutes have not deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, yet they have bestowed on her, independent of him, her earnings on her own account, and given her authority to acquire them. They proceed upon the difference between the discharge of marital duties and independent labor.

As the results of her earning capacity when exerted for herself belong to her, deprivation of that capacity must be to that extent her individual loss. The husband may recover for loss of services belonging to him, but not for loss of the wife's potentiality to earn for herself, nor for her expectation of life in that connection; and if he cannot, she can.

The precise question arose under statutory provisions not materially different from those in Arkansas in *Harmon* v. *Old Colony Railroad Company*, 165 Mass. 100, and it was decided that in an action by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor might be considered as an element of the damages. The reasoning of the opinion seems to us so convincing that we quote from it at length.

The Supreme Judicial Court, after referring to the statutes of 1846, 1855, 1857 and 1874, said:

"By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his; subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her the right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law, the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modified the common law, his right to her services is abridged, though his obligation to support her remains. It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which perhaps may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duties. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicil, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect of this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case."

Counsel for plaintiff in error earnestly urges, however, that the Arkansas statute was adopted in 1873, and was nearly identical with an act of New York of 1860; that a different construction had been put on that act by the courts of New York; and that this construction should be followed in the present instance. But the statutes of Massachusetts, in

the particulars material here, were in force long prior to 1873, and we are not advised that the statutes of Arkansas were transcribed from the statute book of New York rather than from that of some other State. We do not regard this as a case for the adoption of a construction by presumption. Nor need it be conceded that the decisions of the courts of New York are opposed to the rulings of the Circuit Court on the facts of this case.

In *Filer* v. *New York Central Railroad Company*, 49 N. Y. 47, the decision was that unless the wife was actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she had lost by reason of the injury, she had sustained no consequential damages.

In *Brooks* v. *Schwerin*, 54 N. Y. 443, there was evidence that the plaintiff before the injury took care of her family and, also, that she was working out by the day and earning ten shillings a day. To proof of these facts defendant objected on the ground that her time and services belonged to her husband, and could not form ground of damages in the action. The court overruled the objection and defendant excepted. The defendant also excepted to the refusal of the court to charge as requested by him, "that the plaintiff cannot recover for the value of her time and services while she was disabled; such services and time belong, in law, to the husband." It was held that the rulings of the court were proper, and Earl, C., said:

"If the defendant had requested the court to charge that the plaintiff could not recover for the loss of services to her husband in his household in the discharge of her domestic duties, the request could not properly have been refused. But the request was broader, and proceeded upon the idea that all her time and services belonged to her husband, and that she could not recover anything for the value of her time, or for the loss of any service while she was disabled. She was earning in an humble capacity ten shillings a day, and so far as she was disabled to earn this sum, the loss was hers, and the jury had the right to take it into account in estimating her damages."

In *Blachinska* v. *Howard Mission*, 130 N. Y. 497, it was ruled that recovery could not be had by a married woman, in an action to recover damages for injuries sustained through defendant's negligence, for loss of her services in the discharge of household duties, and of other services rendered by her to her husband, and *Brooks* v. *Schwerin* was distinguished, because in that case the wife worked for a stranger, while in this she worked for her husband.

In the present case the evidence tended to show that before the plaintiff was injured she had been engaged for some years in business on her own account, supporting herself and her children, which business had been discontinued for a few months, was renewed, and then given up on account of temporary illness, from which she had in substance recovered, when the injuries sustained incapacitated her from further work.

Under these circumstances we think the Circuit Court did not err in refusing to charge that plaintiff could not recover for diminished capacity to labor because there was "no evidence showing any capacity to labor or earn money at and just before she was injured." To pin the evidence of capacity down to the very point of time when the injury was inflicted upon her was refining too much on the principle involved.

This loss of ability to make earnings outside the discharge of household duties and irrespective of her husband was under the statutes of Arkansas her loss, and not her husband's, and the mere fact that at the moment of the injury she happened to be out of business should not deprive her of the benefit of the rule which would have been otherwise applicable, according to *Filer* v. *Railroad Company* and *Brooks* v. *Schwerin.*

We have assumed, as the jury presumably did, that the earning capacity referred to in the charge had relation to earnings on plaintiff's own account, and if defendant wished this to have been made more explicit, it should have so requested.

The third paragraph of the seventh instruction refused was, "And her lessened capacity to perform household duties cannot be the basis of plaintiff's recovery." But this was not asked as an independent proposition, and the exception was saved to the refusal to give the entire instruction, which as a whole was erroneous and properly refused.

We find no reversible error, and the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.